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1 BEFORE THE

2 FLORIDA PUBLIC SERVICE COMMISSION

3 DOCKET NO. 050863-TP

In the Matter of:

4

COMPLAINT BY DPI-TELECONNECT, L.L.C.

5 AGAINST BELLSOUTH TELECOMMUNICATIONS,

INC. FOR DISPUTE ARISING UNDER

6 INTERCONNECTION AGREEMENT.

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9 VOLUME 1

10 Pages 1 through 149

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15 PROCEEDINGS: HEARING

16 BEFORE: COMMISSIONER KATRINA J. McMURRIAN

COMMISSIONER NANCY ARGENZIANO

17 COMMISSIONER NATHAN A. SKOP

18

19 DATE: Thursday, April 3, 2008

20 TIME: Commenced at 9:34 a.m.

21 PLACE: Betty Easley Conference Center

Room 148

22 4075 Esplanade Way

Tallahassee, Florida

23

REPORTED BY: LINDA BOLES, RPR, CRR

24 Official Commission Reporter

(850) 413-6734

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FLORIDA PUBLIC SERVICE COMMISSION

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1 APPEARANCES:

2 J. PHILLIP CARVER, ESQUIRE, and MANUEL GURDIAN,

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5 on behalf of AT&T Florida.

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11 behalf of dPi Teleconnect, L.L.C.

12 LEE ENG TAN, ESQUIRE, FPSC General Counsel's Office,

13 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850,

14 appearing on behalf of the Florida Public Service Commission

15 Staff.

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FLORIDA PUBLIC SERVICE COMMISSION

3

1 I N D E X

2 WITNESSES

3

NAME: PAGE NO.

4

5 BRIAN BOLINGER

6 Direct Examination by Mr. Malish 51

Prefiled First Amended Direct Testimony 55

7 Inserted

Prefiled First Amended Rebuttal Testimony 59

8 Inserted

Cross Examination by Mr. Carver 79

9 Cross Examination by Ms. Tan 102

Redirect Examination by Mr. Malish 104

10

11

12

13

14

15

16

17 CERTIFICATE OF REPORTER 149

18

19

20

21

22

23

24

25

FLORIDA PUBLIC SERVICE COMMISSION

4

1 EXHIBITS

2 NUMBER: ID. ADMTD.

3 1 Comprehensive Exhibit List 23 23

4 2 STIP-2 23 23

5 3 STIP-3 23 23

6 4 STIP-4 23 23

7 5 STIP-5 23 23

8 6 STIP-6 23 23

9 7 STIP-7 23 23

10 8 STIP-8 23 23

11 9 STIP-9 23 23

12 10 STIP-10 23 23

13 11 STIP-11 23 23

14 12 STIP-12 23 23

15 13 STIP-13 23 23

16 14 STIP-14 23 23

17 15 STIP-15 23 23

18 16 STIP-16 23 23

19 27 AT&T USOC Lookup Tool 79 148

20

21

22

23

24

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FLORIDA PUBLIC SERVICE COMMISSION

5

1 P R O C E E D I N G S

2 COMMISSIONER McMURRIAN: Good morning. We'll call

3 this hearing to order.

4 Staff, would you please read the notice.

5 MS. TAN: Pursuant to notice issued March 14th, 2008,

6 this time and place has been set for an administrative hearing

7 in Docket Number 050863-TP, complaint by dPi Teleconnect,

8 L.L.C., against BellSouth Telecommunications, Inc., for dispute

9 arising under interconnection agreement.

10 COMMISSIONER McMURRIAN: Thank you. Now we'll take

11 appearances.

12 Mr. Gurdian.

13 MR. GURDIAN: Good morning, Commissioners. Manny

14 Gurdian on behalf of AT&T Florida.

15 MR. CARVER: Good morning. Phillip Carver on behalf

16 of AT&T Florida.

17 MR. HORTON: Good morning, Commissioners. Norman H.

18 Horton, Jr., Messer, Caparello & Self. And also I'd like to

19 enter an appearance for Mr. Christopher Malish of Foster,

20 Malish, Blair & Cowen, L.L.P., in Austin, Texas, on behalf of

21 dPi Teleconnect, L.L.C.

22 COMMISSIONER McMURRIAN: Thank you, Mr. Horton.

23 Staff?

24 MS. TAN: Lee Eng Tan on behalf of staff.

25 COMMISSIONER McMURRIAN: Thank you. Staff, I

FLORIDA PUBLIC SERVICE COMMISSION

6

1 understand we have some preliminary matters.

2 MS. TAN: Yes, Commissioner. There is a motion for

3 reconsideration and its accompanying request for oral argument,

4 and AT&T has filed opposition of that request. It is at the

5 Commission's discretion to allow oral argument regarding the

6 motion for reconsideration. Should the Commission decide to

7 allow oral argument, staff's recommendation would be to allow

8 each party five minutes.

9 COMMISSIONER McMURRIAN: Commissioners, is there a

10 motion on oral argument or any questions of staff?

11 COMMISSIONER SKOP: A question for staff. I guess

12 the staff recommendation is to deny oral argument.

13 MS. TAN: No. Staff's recommendation is to allow

14 oral argument.

15 COMMISSIONER SKOP: Okay. At the discretion of the

16 Chair, I'd make a motion to, to have oral argument consistent

17 with your discretion.

18 COMMISSIONER ARGENZIANO: I second.

19 COMMISSIONER McMURRIAN: Okay. Is that for five

20 minutes per side, is that --

21 COMMISSIONER SKOP: Yes. I think that would be

22 appropriate.

23 COMMISSIONER McMURRIAN: Okay. I guess we will begin

24 with oral argument. And, staff, which party should go first?

25 MS. TAN: DPi, for it's dPi's motion for

FLORIDA PUBLIC SERVICE COMMISSION

7

1 reconsideration.

2 COMMISSIONER McMURRIAN: Okay. Mr. Horton.

3 MR. HORTON: Mr. Malish will present the argument.

4 COMMISSIONER McMURRIAN: Thank you.

5 You have five minutes, Mr. Malish.

6 MR. MALISH: Thank you, Commissioner.

7 First of all, Commissioners, I would like to talk to

8 you about what it is that we are asking y'all to reconsider.

9 This has to do with Florida's response, excuse me, AT&T

10 Florida's response to the discovery request that we had which

11 they presented to us a couple of days before the original

12 hearing date and then again in, in November of 2007. It --

13 this is what it is. It's over 1,000 pages of spreadsheet,

14 okay, with about 33 to 35 entries per page.

15 What I'm asking the Commission to reconsider is the

16 admission of Steven Tepera's testimony in which he went through

17 this over 1,000 pages, highlighted those bits and pieces of it

18 that were instrumental or important to, or within it, and

19 summarized those in a series of charts and graphs.

20 Now -- is this on?

21 COMMISSIONER McMURRIAN: You want to make sure that

22 that mike is on there beside you too so the court reporter can

23 hear you as you --

24 MR. MALISH: Okay. Thank you.

25 Basically the data request was for AT&T to go back

FLORIDA PUBLIC SERVICE COMMISSION

8

1 through its records and show us what they actually charged in

2 situations where customers, their retail customers got basic

3 service plus the TouchStar blocking features, HBG, BRD or BCR.

4 And Mr. Tepera went through all of that and he was able to

5 tabulate all of those results and reproduce them in graphs,

6 which basically helps make sense of 1,000 pages of data.

7 That's something that will have to be gone through -- it's not

8 allowed in with Mr. Tepera's testimony. That will have to be

9 gone through basically item by item with, I suppose, with Pam

10 Tipton, AT&T's witness. In the alternative, staff or somebody

11 from the Commission would have to analyze each of those 1,000

12 pages themselves. So I think it's intensely labor saving to

13 have that before the Commission. Let me go back to my chair.

14 And I have a timeline here. Could you go ahead and

15 pass that out for me, please? Doc, you know who to give it to,

16 so why don't you let him have it.

17 Basically AT&T has objected to this coming in on the

18 grounds that it's prejudicial. And I would agree with them, it

19 is prejudicial, because anything that tends to have probative

20 value in a case, whether it's for one side or another, is

21 prejudicial. The question is not whether it's prejudicial.

22 The question is whether it is unfairly prejudicial, whether it

23 is, whether it comes to them as a surprise and whether they

24 have an opportunity to respond to it or not. And the reality

25 of it is that this material is their own material. It's their

FLORIDA PUBLIC SERVICE COMMISSION

9

1 own exhibit that we have gone through and summarized. And

2 Mr. Tepera's testimony is almost the same as items that were

3 presented to the North Carolina Commission in November of 2007.

4 It also appeared in substantively the same form in other sister

5 states where this same kind of litigation is being conducted

6 because, as you know, this is a nine-state problem that dPi has

7 had.

8 So this information has already been before AT&T. In

9 fact, they have already prepared a response, an 18-page written

10 response by lawyers and an 18-page, a separate 18-page

11 affidavit by Pam Tipton addressing this material and dPi's

12 testimony on this in other states. It's already filed that,

13 for example, in North Carolina.

14 So what they are saying is, gee, we don't have time

15 to put together a response. And that's disingenuous because

16 the reality of the matter is they have already got one in the

17 can and they've had it on their word processors since at least

18 December 17th of 2007. So, yes, they're prejudiced because it

19 hurts their case, because it shows the truth about what they

20 gave to their retail customers, but it's not unfairly

21 prejudicial because they have known about it for a long time.

22 I will also point out that this material was

23 initially made available to us two or three days before the

24 original hearing. When it was made available to us we asked

25 for a continuance, it's true, because that was a lot of

FLORIDA PUBLIC SERVICE COMMISSION

10

1 material for us to go through without having any advanced

2 warning of what was in it. That request for continuance was

3 denied and we got ready to go with that stuff in three days.

4 In this case, Mr. Tepera's testimony that was

5 actually filed in Florida was filed 27 days ago, nearly four

6 weeks ago. So if it's enough time to be ready to talk about

7 this for us back in, back in September of '07, if three days

8 was enough time for us to be ready to talk about it at the

9 hearing, then 27 days ought to be enough for AT&T to talk about

10 it since, after all, it is their own material that we have

11 analyzed, and they have seen the analysis and already prepared

12 a response in another, in another place.

13 Now --

14 COMMISSIONER McMURRIAN: Mr. Malish --

15 MR. MALISH: Yes.

16 COMMISSIONER McMURRIAN: -- in keeping with the

17 motion, we're at five minutes. Actually already a little past,

18 so --

19 MR. MALISH: Oh, I'm sorry. Just to wrap up then,

20 it's not unfairly prejudicial to them, they know what it is,

21 they've seen it, they've had time to respond to it and they've

22 already prepared. And we are willing to keep the record open

23 past today's close of the proceedings so that they can resubmit

24 whatever else they would like to change to the testimony that

25 they already have prepared for North Carolina on this exact

FLORIDA PUBLIC SERVICE COMMISSION

11

1 same issue.

2 COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

3 Mr. Carver or Mr. Gurdian, which?

4 MR. GURDIAN: Good morning, Commissioners. My name

5 is Manny Gurdian.

6 DPi ignores the Commission's standard on

7 reconsideration; hasn't even addressed it whatsoever. In her

8 order, the Prehearing Officer found that dPi failed to

9 demonstrate why the additional testimony should be allowed less

10 than three weeks before the hearing in light of the fact that

11 dPi could have sought to supplement this testimony back in

12 December of '07 when they filed Mr. Tepera's affidavit in North

13 Carolina. In addition, the Prehearing Officer determined that

14 the filing at this late date would be prejudicial to AT&T. The

15 Prehearing Officer found that dPi did not justify its request

16 to file additional testimony in light of the April 3rd hearing

17 and denied the requested relief.

18 DPi's motion for reconsideration fails to meet the

19 Commission's standard for review. The Prehearing Officer

20 carefully reviewed dPi's arguments and rejected them. DPi

21 presents nothing justifying reconsideration of the Prehearing

22 Officer's order. DPi simply argues points that should have

23 been argued in its motion for leave to file additional

24 testimony or repeats the same arguments that were presented to

25 the Prehearing Officer in their original motion.

FLORIDA PUBLIC SERVICE COMMISSION

12

1 The order denying the motion was well within the

2 Prehearing Officer's authority. Pursuant to Rule 28-106.211,

3 the Prehearing Officer may issue orders necessary to promote

4 the just and speedy determination of all aspects of the case.

5 This is what the Prehearing Officer did in this case, denied

6 the motion because it would have -- it prevented delay.

7 Both sets of testimony that dPi is trying to have

8 entered into the record here could have been filed months

9 earlier. DPi does not address why it didn't file the

10 testimonies prior to March 7th, 2008, three weeks before the

11 April 3rd hearing date. DPi, by not addressing why it did not

12 file the testimonies earlier, concedes that it had no valid

13 basis for delaying the filing.

14 DPi could have filed the testimonies back in

15 December, back in January and even February of '08. It didn't.

16 DPi has engaged in procedural gamesmanship by waiting until the

17 last minute to file the testimonies. DPi either made a

18 conscious decision to, one, delay the filing in a last-ditch

19 attempt to delay the hearing or held back the testimony in an

20 attempt to disadvantage AT&T.

21 AT&T would be unfairly prejudiced by the late-filed

22 testimony. While AT&T is aware of the topic addressed in the

23 testimony, Mr. Tepera has not filed testimony in any other

24 state. DPi -- excuse me. AT&T has not previously filed

25 rebuttal testimony to this testimony that they're trying to get

FLORIDA PUBLIC SERVICE COMMISSION

13

1 in.

2 So I would, I would ask the Commission to deny dPi's

3 motion and on the basis of: One, they failed to meet the

4 Commission's standard for reconsideration; two, the Prehearing

5 Officer was well within her discretion and authority to deny

6 dPi's requested relief; three, both sets of testimony could

7 have been filed months earlier than dPi chose to file them and

8 dPi has failed to completely explain this delay; four, dPi's

9 inexplicable filing of the testimony can only be viewed as an

10 attempt to disadvantage AT&T; and, five, AT&T will in fact

11 suffer unfair prejudice in this case because of dPi's belated

12 filing of the testimony. Thank you.

13 COMMISSIONER McMURRIAN: Thank you.

14 I guess it would be appropriate, Commissioners, to

15 hear staff's recommendation on the motion for reconsideration

16 first, and then if you have follow-up questions for them or the

17 parties, we'll do that.

18 So I guess we'll hear from staff. Ms. Tan.

19 MS. TAN: Yes, Commissioner. As Mr. Gurdian has

20 stated, the standard of review for a motion for reconsideration

21 is whether the motion identifies a point of fact or law which

22 was overlooked or which was failed to be considered in

23 rendering the order. In a motion for reconsideration it is not

24 appropriate to reargue matters that have already been

25 considered. Rather, in the instant case it appears that dPi

FLORIDA PUBLIC SERVICE COMMISSION

14

1 takes issue with how the timeliness issue was evaluated and

2 consequently simply reargues the merits today. This is not a

3 point of -- a proper basis for reconsideration.

4 Therefore, because dPi has failed to identify a point

5 of fact or a law which was overlooked or which was not

6 considered in the rendering of the order, staff recommends that

7 the motion for reconsideration be denied. Thank you.

8 COMMISSIONER McMURRIAN: Commissioner Skop.

9 COMMISSIONER SKOP: Thank you, Madam Chair.

10 I also feel that dPi has not met the standard of

11 review for reconsideration. And I concur with the staff

12 recommendation at this time and would like to make a motion to

13 deny the motion for reconsideration, subject to further

14 comments from my colleagues.

15 COMMISSIONER McMURRIAN: Do we have a second or

16 further questions?

17 COMMISSIONER ARGENZIANO: Second.

18 COMMISSIONER McMURRIAN: All in favor, say aye.

19 (Unanimous affirmative vote.)

20 Okay. The motion for reconsideration has been

21 denied. And I guess that brings us to our next preliminary

22 matter, Ms. Tan, perhaps stipulated exhibits.

23 MR. MALISH: Commissioners, I don't know if this is

24 the right time to do this, but y'all can let me know if it

25 isn't. We will, of course, need to be making an offer of proof

FLORIDA PUBLIC SERVICE COMMISSION

15

1 on the subject of this testimony, and is that -- is what we --

2 is what we -- is what we have just done sufficient to

3 constitute an offer of proof to preserve our ability to appeal

4 on this subject or is that something that we need to do again

5 during the formal hearing and the presentation of evidence?

6 COMMISSIONER McMURRIAN: Mr. Malish, let me turn to

7 our legal experts.

8 MS. TAN: Yes, that is a proper offer of proof.

9 MR. MALISH: Okay. I would make -- I would like to

10 make sure that the timeline that we passed out is included as

11 part of the record then. Is there, is there any way that I

12 need to do that? Does that need to be marked?

13 COMMISSIONER McMURRIAN: Mr. Malish, this hasn't been

14 included in any of the discovery or any of the stipulated

15 exhibits and all already, has it?

16 MR. MALISH: No.

17 COMMISSIONER McMURRIAN: This is something you just

18 passed out this morning.

19 MR. MALISH: That's correct. That's correct. It's a

20 summary of the facts, some of which were not in our motion,

21 which explain why it is unjust to not allow this testimony to

22 come in.

23 COMMISSIONER McMURRIAN: Commissioner Skop.

24 COMMISSIONER SKOP: Thank you, Madam Chair.

25 I'd like to hear from staff on that because I guess

FLORIDA PUBLIC SERVICE COMMISSION

16

1 as an attorney also I have a concern that might be entering

2 evidence that's not in the record.

3 MS. CIBULA: This is Samantha Cibula on behalf of the

4 Commission. They do not need to enter their own timeline in to

5 preserve their objection and their right to appeal. It's

6 sufficient that they raised their objection to the motion for

7 reconsideration. And if it does go on appeal, the court

8 would -- and decides to overturn the Commission, then they

9 would probably likely tell us to rehave the hearing and then

10 they could offer that evidence in. They do not need to enter

11 that into the record at this point.

12 MR. MALISH: What I'm trying to do is to make sure

13 that the timeline is part of the record so that if on appeal --

14 so that it is available to a court, an appellate court

15 reviewing the proceedings. I need to make sure that it is in

16 the record.

17 MS. CIBULA: That's not necessary.

18 COMMISSIONER McMURRIAN: Commissioner Argenziano, go

19 ahead.

20 COMMISSIONER ARGENZIANO: Yes. I understand they do

21 not need to do that today, but can they?

22 MS. CIBULA: I guess it's within the Commission's

23 discretion to put that into the record, but I advise that we do

24 not need to have that done today.

25 MR. CARVER: And I object to placing it into the

FLORIDA PUBLIC SERVICE COMMISSION

17

1 record because this is not evidence. This is dPi's summary of

2 the evidence or version of the evidence. It's essentially

3 their argument as to what transpired. It's not any actual

4 documentation that demonstrates what transpired. And just in

5 the couple of minutes that I've had to glance at it I've

6 noticed at least one thing that's drastically misstated, that

7 is absolutely not, not fairly stated. And that's on Page 2,

8 they have "February 4th through 11 AT&T initiates attempts to

9 depose Steven Tepera and Steve Watson." We initiated attempts

10 to depose them in Alabama. In the Alabama proceeding they did

11 raise this issue timely. They raised it through the issue of

12 Mr. Bolinger who will be testifying and we can cross him then.

13 But we were trying to take the deposition of those other two

14 witnesses for purposes of the Alabama hearing.

15 Now the Alabama hearing was set to go in a couple of

16 weeks but it's been continued and we currently have no trial

17 setting for that, for that case. So I anticipate that we will

18 try to depose Mr. Tepera and Mr. Watson to the extent that that

19 is an issue that's been timely and appropriately raised in that

20 proceeding. The way it's stated here, it makes it look as if

21 we were trying to depose them to gather information for this

22 proceeding, and it's just not true. That's not what happened

23 at all.

24 Now that's just one thing that jumps out at me. But

25 I think it illustrates the point that this is their version of

FLORIDA PUBLIC SERVICE COMMISSION

18

1 what occurred. It's argument. It's not, it's not evidence,

2 it's not anything that should go into the record. It's simply

3 the kind of argument that they're free to make in the appellate

4 court, if they wish. But I think for them to categorize this

5 as evidence and try to put it into the record as if it's facts

6 rather than argument and opinion, I believe that's

7 inappropriate and I object.

8 COMMISSIONER McMURRIAN: Commissioners, just to share

9 my thoughts -- hold on, Mr. Malish.

10 MR. MALISH: Uh-huh.

11 COMMISSIONER McMURRIAN: It seems unusual for someone

12 to try to enter something in the record as part of their oral

13 argument. That is, I've sat through a lot of hearings. It's

14 pretty unusual. I'm not sure that it can't be done.

15 Ms. Cibula said it's up to our discretion. But it seems to me

16 that there are other ways for you to get this information into

17 the record during the regular cross-examination.

18 MR. MALISH: The problem is that many of the things

19 that are in here are procedural matters that are not directly,

20 are not directly connected to this case, this particular case

21 in Florida. Of course, the testimony that we're talking about

22 here is replicated from state to state to state since the

23 litigation on the same subject matter, the question of whether

24 the LCCW promotions were made properly or not made properly to

25 dPi goes on in nine different states. It's the same testimony

FLORIDA PUBLIC SERVICE COMMISSION

19

1 of the same people over and over again.

2 And what this is -- basically I will swear to this

3 because you're talking about a lawyer's replication of the

4 procedural things that have taken place in this litigation, not

5 just in Florida but in the entire nine-state region. And so

6 what I would like to do is I would like to swear to the truth

7 of the matters in this. The only purpose of that is to

8 preserve this for appellate review. And, of course, it won't

9 be part of y'all's decision-making in this case. It is -- it

10 may be superfluous to the record and they can argue about that

11 it means nothing later. But it's important to us to have it in

12 the record at this time and appellate judges can decide later

13 whether it's important or not. Obviously it's not important

14 for y'all's decision on the merits, but it is important for us

15 to preserve the record. And typically what happens, I think,

16 in like, for example, a court of law would be that we'd offer

17 it, everybody objects, and we understand that it's in the

18 record for the purposes of appeal but it is not evidence in the

19 case.

20 COMMISSIONER McMURRIAN: Mr. Malish, I'll turn to

21 staff and get their opinion on this. But I -- there's a reason

22 we have deadlines for parties filing testimony, so that the

23 other side has an opportunity to file some kind of rebuttal to

24 that testimony. And I appreciate the fact that you're willing

25 to swear to it, but that's not -- the attorneys swearing to

FLORIDA PUBLIC SERVICE COMMISSION

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1 information is not usually the way a technical hearing is done

2 under the statutes as far as I understand it. But I will turn

3 to staff before I get myself in a mess and say something wrong

4 here, but I will turn to them and get their input on this.

5 Thank you.

6 Ms. Cibula.

7 MS. CIBULA: The document is not needed for appeal

8 purposes. The -- they've objected to our ruling on the motion

9 for reconsideration and that's enough to preserve the issue on

10 appeal, and that document is not needed to be placed into the

11 record. It almost seems like it's a way of trying to

12 circumvent our process in getting this evidence into the

13 record, and that's not appropriate at this point.

14 MR. MALISH: Well, the --

15 COMMISSIONER McMURRIAN: So, Ms. Cibula, as far as

16 ruling on this in some way, do we even need to make a ruling on

17 the request to put this in the record somehow or do we just

18 move on?

19 MS. CIBULA: I would just move on.

20 COMMISSIONER McMURRIAN: Thank you. Okay.

21 MR. MALISH: In that case, I'll offer it and then

22 that way it'll be in the record and y'all just --

23 COMMISSIONER McMURRIAN: Mr. Malish, it won't be in

24 the record at this time because you offer it, I don't believe.

25 MR. MALISH: I will offer it and the Commission can,

FLORIDA PUBLIC SERVICE COMMISSION

21

1 can -- can not admit it. And at this point in time dPi moves

2 to offer the timeline on the Florida Public Service

3 Commission's decision to not permit supplemental testimony into

4 the record. And I don't have a number for that. I'll let the

5 court reporter tell us what's the next number they would like

6 to assign to this exhibit.

7 COMMISSIONER McMURRIAN: Commissioner Skop.

8 COMMISSIONER SKOP: Thank you, Madam Chair. Can I

9 take a -- can we take a brief second before we rule on that so

10 I can confer with legal staff?

11 COMMISSIONER McMURRIAN: Absolutely. We'll take a

12 short five-minute break.

13 COMMISSIONER SKOP: Thank you.

14 (Recess taken.)

15 COMMISSIONER McMURRIAN: We'll go back on the record,

16 if everybody is ready.

17 Commissioner Skop.

18 COMMISSIONER SKOP: Thank you, Madam Chair.

19 After conferring with legal staff and noting that dPi

20 has formally objected to the denial for reconsideration, that's

21 adequately protected the record for appeal. And I think that

22 in lieu of continuing to persist in trying to admit evidence,

23 we need to move on, and I would respectfully request the Chair

24 of the proceeding to advise dPi accordingly.

25 COMMISSIONER McMURRIAN: Mr. Malish, I agree. I

FLORIDA PUBLIC SERVICE COMMISSION

22

1 believe that you have on the record stated your concerns about

2 your proposed exhibit on this timeline. I think that you have

3 preserved your right to, for appeal, and I think it is time to

4 move on.

5 MR. MALISH: Okay.

6 COMMISSIONER McMURRIAN: So we will move on to staff,

7 and staff will go through the procedure regarding the

8 stipulated exhibits.

9 MR. MALISH: I'm sorry.

10 COMMISSIONER McMURRIAN: Mr. Malish, I'm sorry. We

11 are going to move on at this point.

12 MR. MALISH: I understand that we're going to move

13 on, Your Honor. I need to -- I'm making -- I'm offering this

14 as part of my offer of proof for it to be in the record, not as

15 part of the evidence but simply as part of the appellate

16 record.

17 COMMISSIONER McMURRIAN: Ms. Cibula, one more time,

18 and this is the last time, Mr. Malish.

19 MR. MALISH: And y'all can refuse to let it in.

20 That's fine. I understand. But I just need to have that

21 ruling.

22 COMMISSIONER McMURRIAN: Mr. Malish, I am turning to

23 Ms. Cibula now. Thank you.

24 MS. CIBULA: And I believe you have refused to let it

25 in and we can just move on now.

FLORIDA PUBLIC SERVICE COMMISSION

23

1 COMMISSIONER McMURRIAN: Thank you.

2 Ms. Tan.

3 MS. TAN: Commissioners, staff has compiled a list of

4 discovery and testimony exhibits that we believe can be entered

5 into the record by stipulation. In an effort to facilitate the

6 entry of these exhibits, we have compiled a chart that we have

7 provided to the parties, the Commissioners and the court

8 reporter. I would suggest that the list itself be marked as

9 the first hearing exhibit and that the discovery exhibits be

10 marked thereafter in sequential order as set forth in the

11 chart.

12 COMMISSIONER McMURRIAN: Show those exhibits marked

13 as indicated, Exhibits 1 through 16, I believe. Is that right?

14 MS. TAN: Correct.

15 And at this time staff requests to move into the

16 record Exhibits 1 through 16.

17 COMMISSIONER McMURRIAN: Show --

18 MR. MALISH: No objection from dPi.

19 MR. CARVER: No objection.

20 COMMISSIONER McMURRIAN: Thank you. I was about to

21 pass over that part. I thought we had a stipulation already,

22 but thank you both for getting that on the record. And show

23 Exhibits 1 through 16 admitted into the record as shown on

24 Exhibit Number 1. Thank you.

25 (Exhibits 1 through 16 marked for identification and

FLORIDA PUBLIC SERVICE COMMISSION

24

1 admitted into the record.)

2 MS. TAN: Excellent. And the remaining exhibits, the

3 remaining identified exhibits will be proffered by the

4 respective parties at the time that their witnesses are

5 testifying.

6 COMMISSIONER McMURRIAN: Thank you. Any other

7 preliminary matters?

8 Okay. We'll move into opening statements. I think

9 we settled on 15 minutes each side. Is that right, Ms. Tan?

10 MS. TAN: That is correct.

11 COMMISSIONER McMURRIAN: And dPi would go first

12 again, is that -- okay. Mr. Malish, you have 15 minutes.

13 MR. MALISH: Thank you, Commissioner.

14 COMMISSIONER McMURRIAN: Thank you.

15 MR. MALISH: Commissioners, I prepared a little cheat

16 sheet so you can -- to make it easier for you to follow along

17 as I go through my presentation, which Mr. Horton will be

18 distributing here.

19 To give you an overview about what we'll be talking

20 about both in my opening today and during the course of the

21 presentation of the entire hearing, we're going to talk a

22 little bit about the basic law on resale in telecommunications,

23 the promotion credit process which is at the bottom of this

24 proceeding in particular, and then the particular promotion in

25 dispute under the credit promotion process, which in this

FLORIDA PUBLIC SERVICE COMMISSION

25

1 particular case is the Line Connection Charge Waiver. Then

2 I'll talk a little bit about how dPi qualifies for the

3 promotion, and then I want to talk a little bit about the

4 various "yeah, buts" that we have from BellSouth. "Yeah, but

5 dPi is not entitled to that promotion for," fill in the blank.

6 There's various reasons for it and we'll get to those in a

7 moment.

8 I need to go over the law on resale to put this case

9 in context. There's a bunch of court opinions on it, but

10 everything basically derives from the Federal

11 Telecommunications Act of 1996. So 47 U.S.C. 251(c), which is

12 the basic duties of incumbents requires that ILECs such as

13 BellSouth have the duty to offer for resale at wholesale rates

14 any telecommunications service that the carrier provides at

15 retail to subscribers who are not telecommunications carriers

16 like dPi.

17 And then under 251(c)(4)(B) they have, BellSouth has

18 a duty to not prohibit and not impose unreasonable or

19 discriminatory conditions or limitations on the resale of such

20 communications service. And that's been developed a little

21 further by the FCC in 47 C.F.R. 51.613(a)(2). And basically

22 that provision is there in front of you, but basically what it

23 says is that if BellSouth provides a service or a price at

24 retail, it must provide it to dPi at a wholesale discount,

25 period, even with promotions, unless those promotions run for

FLORIDA PUBLIC SERVICE COMMISSION

26

1 less than 90 days, which is not the situation here.

2 Now this is important because -- this is what the law

3 says. You can sum it up this way. If AT&T provides something

4 to its retail customer, then dPi can get the same thing from

5 AT&T at a discount just the same as if it were standing in the

6 shoes of the retail customer. The reason why that's important

7 in this particular case -- there's two reasons that it's

8 important. First of all, because the evidence that's come into

9 the case so far, including the stack of documents that

10 Mr. Tepera analyzed, those are the raw datas in the file. That

11 shows that for this Line Connection Charge Waiver that we're

12 talking about, AT&T repeatedly and systematically gave that

13 waiver, that Line Connection Charge Waiver to its own retail

14 customers taking service the same way that dPi's orders were

15 placed, and I'll talk about that a little bit more in the

16 future or later in my presentation.

17 The other reason why this idea is important, that if

18 AT&T gives it to its retail customers it has to give it to dPi,

19 is because AT&T has raised a claim in this case that

20 contradicts, that contradicts the law. This is the law. AT&T

21 is saying we don't have to do that. We only have to give

22 something to dPi if whatever it is we give to dPi, dPi turns

23 around and gives to its customers. These are third parties.

24 These are not related to the relationship between AT&T and dPi

25 or between AT&T and its own retail customers. This is a faulty

FLORIDA PUBLIC SERVICE COMMISSION

27

1 analysis that goes against the law and it goes against parts of

2 the contract too, and we'll talk about that later. That's why

3 it's important to know what the law says about promotions and

4 retail offerings.

5 Mr. Watson is going to talk about the promotion

6 credit process. And basically what it is is they have, AT&T

7 has its tariffed prices and then they have special deals which

8 are promotions. Under the laws I described earlier they are

9 required to make that available to AT&T, excuse me, to dPi at

10 the wholesale rate. The problem that we have here in the

11 BellSouth region is that unlike in the, in the former SBC, SWBT

12 and Ameritech and other regions like that, although BellSouth

13 automatically provides its retail end users with correct

14 pricing, it doesn't do that for its wholesale users. So, for

15 example, if the -- I'm making up promotion right now. If it's

16 $10 off when you sign up, if you were a retail customer and you

17 signed up with AT&T, you would automatically get $10 off your

18 bill. There would be nothing more to do about it.

19 By contrast, here in the BellSouth territories what

20 happens is BellSouth charges the full retail rate every single

21 time regardless of whether the promotion applies. So in

22 practical effect they are every single time overcharging the

23 CLEC for the services they are providing to the CLEC. And it

24 becomes incumbent upon the CLEC to go through the data, the

25 billing data and generate what's called BAR requests, billing

FLORIDA PUBLIC SERVICE COMMISSION

28

1 adjustment requests. They have to go back through and ask to

2 have the money given back to them that they're entitled to to

3 begin with. The problem is that this process is extremely

4 complicated, and if at any step along the way you get something

5 wrong, your request for credit is denied. And so as a

6 practical effect, BellSouth keeps your money. That's one of

7 the problems that we're dealing with in this particular

8 instance. Now this, this applies for all promotions, not just

9 the LCCW promotion that we're talking about now.

10 Basically in this particular case the other

11 promotions have fallen by the wayside because the LCCW

12 promotion, they've either been paid after, after negotiation

13 or, you know, after we've wrangled through it we've found that

14 the other ones, the amount in dispute is basically mini,

15 miniscule -- very tiny compared to, very tiny compared to the

16 amount of attorney time and witness time that it would take to

17 actually litigate those particular other promotions. So the

18 promotion that's in dispute today in this case is the Line

19 Connection Charge Waiver. And that's on -- there's a little

20 number eight at the bottom of one of those pages that you have

21 there, and that's -- and that promotion provides that they

22 will, they will waive the line connection charge in a situation

23 when the customer switches their local service to BellSouth and

24 purchases any one of the following three sets of things:

25 BellSouth Complete Choice plan, BellSouth PreferredPack plan or

FLORIDA PUBLIC SERVICE COMMISSION

29

1 BellSouth basic service and two custom calling or TouchStar

2 local features.

3 DPi is a reseller primarily to credit challenged,

4 credit challenged customers, residential customers. Almost

5 every one of their customers is somebody that has been

6 disconnected for not paying BellSouth or somebody else. These,

7 these are not the most -- the best customers to have, but

8 that's the niche that dPi works in. So basically everyone that

9 they have is somebody that has been fired by BellSouth or by

10 another carrier. So as a consequence they are getting --

11 everyone that they get they're getting because they haven't

12 been able to make their payments to BellSouth or somebody else.

13 Every line that dPi orders from BellSouth is ordered

14 with a minimum package of POTS, 1FR, that's basic telephone

15 service plus two or more of the following TouchStar blocks

16 known by their universal service ordering codes of BCR, BRD and

17 HBG. That's Block of Call Repeat, Block of Repeat Dialing, and

18 HBG is Block of Call Trace. Okay? Those are all TouchStar

19 features that are listed in the tariff.

20 Now historically BellSouth has paid or awarded these

21 promotions. They've done it with their retail customers and

22 they've done it with other CLECs. For example, you'll hear

23 from Steve Watson, who basically put together the promotion

24 credit processing process with, with, with BellSouth, that, you

25 know, we submit these orders this way, they looked at them

FLORIDA PUBLIC SERVICE COMMISSION

30

1 together and it was approved. Okay. So historically they've

2 done it. They did it for most of 2004, January, February,

3 March, April of 2004. Then there was, there was a lull when

4 there was none of these being processed, and then they did it

5 again in the summer of 2004 before dPi submitted its, made its

6 submissions and they were cut off. All right? So dPi made its

7 submissions in approximately August, September of 2004 and

8 didn't hear anything for almost nine months about whether these

9 promotions were going to be granted or not.

10 And we find out afterwards that internally BellSouth

11 was going through a series of sort of how can we find a way to

12 not pay these? And this was communicated in one way or another

13 to us during discovery or actually during the course of the, of

14 the proceedings. The first "yeah, but," "Yeah, but we don't

15 have to pay" was "those customers aren't winovers, are not

16 reacquisitions." And that was essentially dropped because when

17 they realized the customer base that dPi has is basically

18 everybody that's been fired from somebody else or disconnected

19 from somebody else. So that went from like September of '04 to

20 January of '05. And that was a big one for BellSouth because

21 that's why so many of their own customers don't qualify for

22 this promotion because most of their own retail customers are

23 not somebody that they have won from some other carrier because

24 they are the monopoly down here.

25 The second "yeah, but" was, "Hey, these things aren't

FLORIDA PUBLIC SERVICE COMMISSION

31

1 features, BCR, BRD, HBG, those are not features." The problem

2 with that though is that these items, these USOCs are

3 specifically listed in the TouchStar, TouchStar feature section

4 of the tariff, and we'll go over that in this case. The tariff

5 refers to these things specifically as features. Historically,

6 in the UNE analog to resale they are referred to as features

7 and they're repeatedly referred to as features by BellSouth's

8 own employees.

9 The next sort of "yeah, but" was -- and that's gone

10 from January to 2005 to the present is, "Yeah, but these aren't

11 things that you have purchased at additional cost." So they're

12 reading in some additional language there, "not purchased at

13 additional cost." If you look at the promotion, what the

14 promotion says, the words in it do not have additional costs

15 anywhere in there. It just basically says you have to buy one

16 of the following three packages: BellSouth Complete Choice

17 plan, BellSouth PreferredPack plan or basic service and two

18 local features. That's that little slide with the Number 13 at

19 the bottom of, in the bottom right-hand corner. And, of

20 course, terms of contracts like this are construed most

21 strongly against the party who drafts them. This is sort of a

22 universal construction, common law construction of contracts

23 theorem. So if they're saying it's ambiguous, then if it's

24 ambiguous, it has to be construed against them. And, of

25 course, as I've mentioned before, dPi always purchases at

FLORIDA PUBLIC SERVICE COMMISSION

32

1 least, unless the customer orders something more extravagant,

2 basic service with those blocks.

3 The next "yeah, but" that BellSouth came up with is

4 basically from January of '06 to the present is, "Yeah, but our

5 end users don't get this." And what turns out is that although

6 that's what they say in their testimony, the actual billing and

7 provisioning data that they provided in this case shows that,

8 in fact, they did give this Line Connection Charge Waiver to

9 their retail customers repeatedly and systematically from two

10 thousand and -- let's see, is it 2003 -- from May of 2003, the

11 first data point that we have, all the way up to the present.

12 And, and percentages ranging from approximately 15 to

13 approximately 40 percent of the time when a BellSouth end user

14 submitting an order configured the way dPi's orders are

15 configured, that BellSouth end user gets the discount. And the

16 best explanation for why the other 85 to 60 percent don't get

17 it is because they don't qualify for another reason, that being

18 that they aren't winback or winover customers.

19 The last of the "yeah, buts" is made for the first

20 time, I think, in September of '06, and it's basically this

21 idea that I showed you before that we have a footnote in the

22 contract that trumps federal law. Remember, the law says that

23 if AT&T makes it available at retail, it has to make it

24 available to dPi at wholesale, period, end of story. There's a

25 footnote attached to a chart at the back of the contract with

FLORIDA PUBLIC SERVICE COMMISSION

33

1 some language in it that AT&T is now saying allows them to

2 perform a different inquiry. They say it doesn't matter if we

3 gave it to our retail customer. What we, AT&T, get to do is we

4 get to -- we have to make sure that if we gave the discount to

5 you, you must also have given it to your customer, and your

6 customer must have made specific requests to dPi for the things

7 that dPi ordered from us. So they're putting additional

8 restrictions beyond what the law allows. The law just says if

9 AT&T gives it to their retail, they have to give it to dPi. It

10 doesn't matter what dPi does with it after the fact. That's

11 what the law says. But they're saying that the contract

12 excuses them from, from that analysis. Okay?

13 They point to a footnote. But, in fact, if you read

14 the rest of the contract, you will see that the rest of the

15 contract, if you don't look at just a footnote at the back and

16 try to interpret it in a certain way to help their side, if you

17 read the rest of the contract, it says that the contract as a

18 whole is basically supposed to be an interconnection agreement

19 pursuant to Sections 251 and 252 of the FTA. Those are the

20 provisions that I talked with you about at the beginning of my

21 presentation, the one that says they have the duty to offer at

22 resale the same services they offer to their own retail

23 customers.

24 Another part of their contract says parity. When dPi

25 purchased tele, excuse me, telecommunications services from

FLORIDA PUBLIC SERVICE COMMISSION

34

1 BellSouth pursuant to this agreement, such services shall be

2 subject to the same conditions that BellSouth provides to its

3 end users. So the conditions that are important are the

4 conditions between AT&T and its end user and not between dPi

5 and dPi's end user. Furthermore, the contract provides that

6 the governing law, under the governing law provision that the

7 contract will be governed by and construed in accordance with

8 federal and state substantive telecommunications law, including

9 the rules and regulations of the FCC, which are the provisions

10 that I showed you at the beginning of this presentation.

11 COMMISSIONER McMURRIAN: Mr. Malish, can you wrap up

12 in less than one minute?

13 MR. MALISH: I can.

14 COMMISSIONER McMURRIAN: Because we already passed

15 15, and I'm going to have to give BellSouth the same amount of

16 time, but I think we need to stick with what we said. So if

17 you could wrap up.

18 MR. MALISH: Well, you see the rest of what it says

19 in the contract and we'll go over that in the hearing.

20 Bottom line is that at the end of the day in Florida

21 BellSouth wrongfully denied $58,210 in promotions by refusing

22 to count the BCR, BRD and HBG as qualifying features and denied

23 a further $19,737 as being not winbacks.

24 Sorry for running over.

25 COMMISSIONER McMURRIAN: Thank you.

FLORIDA PUBLIC SERVICE COMMISSION

35

1 Mr. Carver, Mr. Gurdian? Mr. Carver.

2 MR. CARVER: Actually before I begin, I have a couple

3 of exhibits that, to Ms. Tipton's testimony that Mr. Gurdian

4 will be passing out. I'd like to provide them to the

5 Commission and staff to look at while I'm talking. I think it

6 will help understand our argument.

7 (Pause.)

8 Thank you. As you can imagine, AT&T disagrees with

9 most of what Mr. Malish said. In our view this is really a

10 very simple and straightforward case. DPi claims that it's

11 entitled to promotional credits. We believe that they're not,

12 and we believe that you can determine that they're not based on

13 only three things. The first thing are the requirements of the

14 retail promotion. Those are set forth in the tariff. They're

15 very clear and they set forth what a retail customer must do to

16 qualify.

17 The second thing, and I'll discuss each of these in a

18 little bit more detail later, but I just wanted to set out the

19 three up front. The second thing is the terms of the resale

20 agreement. Now, as Mr. Malish said, AT&T does have to make

21 this retail promotion available to other CLECs or to CLECs for

22 resale, and we do, we make it available to them. However, they

23 have to qualify. And since they're not retail customers, they

24 obviously can't buy from a tariff, so there has to be some

25 mechanism to make it available to them, and that mechanism is

FLORIDA PUBLIC SERVICE COMMISSION

36

1 the interconnection agreement. And it has the terms that the

2 parties negotiate for that resale. And if we look at the

3 language of the interconnection agreement and of the terms in

4 it, we can see that dPi doesn't qualify.

5 The third thing -- there are four or five key facts

6 that you'll need to consider. And if you look at these facts

7 against these two documents, the tariff and the interconnection

8 agreement, you can see that they absolutely do not qualify.

9 And I'd like to talk about each of those three in a little bit

10 more detail.

11 The first thing that we passed out, the first page is

12 a copy of the actual tariff. This is an exhibit to

13 Ms. Tipton's testimony. And what I've done is I've highlighted

14 in yellow the parts that are applicable to the dispute that we

15 have. The things that I haven't highlighted are things

16 relating to Complete Choice, that type of thing, and those just

17 aren't at issue here.

18 So we look at what's highlighted. The retail

19 promotion says that the line connection charge will be waived

20 for residential customers who purchase basic service and two

21 features. And the "and" in that last line or the next to the

22 last line is very important because the requirement under the

23 clear language is that there must be a purchase of the basic

24 service and there must be a purchase of the features. And I

25 need to talk a little bit about what features are in the

FLORIDA PUBLIC SERVICE COMMISSION

37

1 context of the tariff and in the context of the way this works.

2 Basically a feature would be something like, say, for

3 example, Call Return. Excuse me for a moment. If a customer

4 is thinking about getting Call Return, they really have three

5 options. The first thing they can do is they can subscribe to

6 Call Return. And if they subscribe to Call Return, then that

7 would count toward the two features that they would need to

8 qualify for the promotion. That's their first option.

9 Their second option is they can decide that they

10 don't want to subscribe to Call Return but they do want to have

11 the option of using it on a per use basis. For example, even

12 if you don't subscribe to Call Return, you can pick up the

13 phone, you can dial \*69, and the call will be returned and

14 there is a per use charge for that.

15 The third option that the customer has is that they

16 can place a block on the line so that Call Return can't be used

17 even on a per use basis. For example, if they have children,

18 they may not want them to use it, they may not want to incur

19 those costs. So the options are subscribe to the service, have

20 the service available on a per use or block the service so that

21 it can't be used at all.

22 And there's a crucial difference which will really

23 play a big part in this case between features and blocks. A

24 feature -- call return is the feature, and there are others,

25 Call Trace and several others, and these provide something to

FLORIDA PUBLIC SERVICE COMMISSION

38

1 the customer. They provide a function, something the customer

2 uses, and the customer pays for these. A block is not a

3 feature. A block is something that disables the feature and

4 there's no charge for that. That's specifically in the tariff

5 that when a customer wants to engage the blocks, there is no

6 charge. So that's basically the promotion in a nutshell. It's

7 not that complicated. It's really just expressed in a few

8 operative words in the tariff.

9 Now we go to the interconnection agreement. And,

10 again, I just want to emphasize that this case really has

11 nothing to do with availability of the promotion because we are

12 required by law to make it available, but dPi still has to

13 qualify. I mean, our retail customers have to qualify. DPi's

14 customers have to qualify. So the availability issue is, is

15 really not the issue at all. The issue is whether or not they

16 qualify. And, again, since they are reselling the service,

17 they are offering it pursuant to the terms of a resale

18 agreement and it's part of the interconnection agreement.

19 And if you'll look at the second page that I gave

20 you, at the bottom of that chart there is a line which has

21 language that the parties specifically negotiated. And I just

22 want to mention this was not an arbitrated agreement, this was

23 something the parties negotiated and they put it into this

24 agreement. And it says, "Where available for resale,

25 promotions will be made available only to end users who would

FLORIDA PUBLIC SERVICE COMMISSION

39

1 have qualified for the promotion had it been provided by

2 BellSouth directly." That's the operative language. Okay? So

3 the two standards that really apply here are the tariff and

4 this particular language.

5 Now here are the facts that are important. And,

6 again, there are really only about four or five of them, and

7 these are for the most part uncontroverted, at least based on

8 the testimony that's been prefiled.

9 First of all, when dPi signs up a customer for basic

10 local service, they automatically place blocks on the

11 customer's line every single time so that the customer can't

12 engage features. And they don't ask the customer's permission.

13 In fact, they don't even tell the customer they're doing it.

14 The block is there every single time. Then after the fact they

15 don't tell the customer, so the customer has absolutely no

16 knowledge that these blocks have been placed on their line.

17 Then dPi takes these blocks and submits them to AT&T,

18 claims that they're features, and then they try to get the

19 promotional credit. So they're not submitting any features at

20 all. They are submitting free blocks, blocks available at no

21 charge. Then after the fact -- in some instances they do have

22 customers who order features and the Line Connection Charge

23 Waiver is given to those customers, the ones who qualify. But

24 when dPi gets that money back, when they get the credit, they

25 don't give it to the customer. They keep it. So the customer

FLORIDA PUBLIC SERVICE COMMISSION

40

1 has no knowledge of this entire event. They have absolutely no

2 knowledge of what's occurred. So when we look at those facts

3 and we look at the standard, you can see that dPi is not

4 entitled to the credits that they're seeking. And they don't

5 qualify for three reasons, and they're very straightforward. .

6 The first is that the promotion requires the purchase

7 of features. Since dPi is submitting blocks, they aren't

8 submitting features. Again, there's a distinct difference

9 between features and blocks. So since dPi submits no features,

10 since they submit only blocks, they can't qualify.

11 The second reason is blocks are free of charge. And

12 the language that I pointed out to you early specifically says

13 that there must be a purchase of features. Adding blocks at no

14 charge does not constitute a purchase.

15 And the third reason is there's no order. I mean, if

16 we go back and we look at the resale agreement, it specifically

17 said that the promotion would be made available to the end

18 user, which means if the end user has a qualifying order, then

19 the promotional credit is given to dPi. And, granted, dPi can

20 do whatever they want with it, but the customer has to order.

21 That's what the language means when it says "made available to

22 the customer."

23 Well, in this case the customers ordered nothing.

24 DPi simply placed blocks on their lines without telling them

25 that they were doing it in order to try to generate discounts.

FLORIDA PUBLIC SERVICE COMMISSION

41

1 Now they may have had other business reasons for doing it. I'm

2 not denying that. But the fact is they placed these on the

3 customer lines and then they submitted the blocks, not

4 features, to try to generate the waiver.

5 So those are the three reasons: No purchase, they're

6 not features, are not blocks, and the customers didn't order

7 anything.

8 Now the last thing I want to talk about very briefly

9 is Issue 2. And you'll notice that dPi didn't talk about that

10 at all. That's because there are two other promotions, they're

11 relatively small promotions. And when I say small, I mean the

12 amount of money in controversy is relatively small. And I'm

13 just going to touch on them by noting that Ms. Tipton covers at

14 some length in her testimony the reasons that dPi does not

15 qualify. DPi does not address them in their testimony at all.

16 So those two features that are addressed in Issue 2, the facts

17 are, the evidence is uncontroverted.

18 So if you look at Issue 2 and Issue 1, in each

19 instance dPi has failed to qualify for their promotional

20 credits, and for that reason you should find in favor of AT&T.

21 Thank you.

22 COMMISSIONER McMURRIAN: Thank you, Mr. Carver.

23 Commissioner Skop.

24 COMMISSIONER SKOP: Thank you, Madam Chair.

25 And I'd like to also ask staff -- but I just had some

FLORIDA PUBLIC SERVICE COMMISSION

42

1 follow-ups to Mr. Malish's opening comments and I just wanted

2 to see if this would be the appropriate time to ask two brief

3 questions before we went into witnesses.

4 MS. TAN: If you have questions, you may ask them at

5 this time.

6 COMMISSIONER SKOP: Thank you.

7 Mr. Malish, I just wanted to reflect upon two points,

8 just trying to come up to speed on the issues before us. In

9 your opening statement you mentioned or alleged that BellSouth

10 effectively keeps your money, and I just wondered whether

11 you're offsetting amounts that dPi owes to BellSouth currently,

12 thereby, you know, effectively keeping their money? So I'm

13 just interested in that.

14 MR. MALISH: The answer is yes and no.

15 COMMISSIONER SKOP: Okay.

16 MR. MALISH: Sorry. For part of the time dPi did not

17 offset and for part of the time it did. So -- and I don't know

18 the breakdown. I mean, Mr. Bolinger will probably know when

19 he's questioned on the stand if y'all ask him that question.

20 But the way I understand it is that they were supposed to be

21 getting this back and they weren't. And they, you know, waited

22 more than nine months and it was promised them and they didn't

23 get it and then they started offsetting after that.

24 COMMISSIONER SKOP: And then secondly -- and I do

25 appreciate the little PowerPoint slide because it's, you know,

FLORIDA PUBLIC SERVICE COMMISSION

43

1 easy to kind of comprehend the issues.

2 Looking at the things before us, and I was just

3 wondering as you went along in the presentation, and I've heard

4 what AT&T has stated, apparently there's, there seems to be a

5 tension between, as you state, the law and the footnote that

6 provides some additional restrictions that AT&T imposes upon

7 dPi in that footnote. And I was just wondering why equity

8 wouldn't support the imposition of those additional

9 restrictions, I guess, to the extent that in one scenario AT&T

10 is offering it directly to the consumer, but yet in the

11 capacity that I think is being engaged upon by your company,

12 you're essentially doing it to arbitrage the promotions to

13 enhance creating value to your bottom line as opposed to

14 passing those through directly to the consumer.

15 MR. MALISH: Let me try to restate your question to

16 make sure I understand what you're, what you're asking me.

17 I think you're asking me would it be equitable for

18 dPi to pass on whatever discounts it gets from AT&T to its end

19 users.

20 COMMISSIONER SKOP: No. I think what I'm saying is

21 it seems to be that, you know, the restrictions that you

22 take exception to that are imposed by AT&T, and I believe

23 Footnote 2 of the attachments that they provided seems to imply

24 that, you know, the promotions, the intent of the promotions is

25 to pass that value directly down to the consumers such that

FLORIDA PUBLIC SERVICE COMMISSION

44

1 they benefit. So that's an equal parity of offering a

2 promotion in the same sense as offering a promotion that they

3 have to offer to you guys. But essentially what I think may be

4 happening here is that dPi is leveraging that promotion to

5 extract value that's ultimately not passed down due to

6 consumers, so and the extent that, you know, maybe unclean

7 hands -- you know, maybe equity would come in. I just wanted

8 to get your take on that

9 MR. MALISH: Okay. Well, to begin with, you have to

10 realize that AT&T doesn't do any promotions for the benefit of

11 the CLECs. So the promotion is created originally as a way to

12 somehow improve the business of AT&T and not to improve the

13 business of --

14 COMMISSIONER SKOP: I understand. Let me, let me

15 get -- let me stop you there and get you back on point. What

16 I'm trying to get at is that in AT&T's scenario, the, the

17 promotion extends directly to the consumer. Here it's being

18 intercepted by the middleman with some of the perhaps benefit

19 not reaching the consumer. So how can you distinguish between

20 those two in terms of the required offering?

21 MR. MALISH: Okay. Well, because the way the law

22 is -- the way the law works is that what essentially happens

23 with a promotion like that is that it allows, it allows AT&T to

24 undercut its basic retail tariff pricing. And so if the

25 promotion is not extended to dPi, then, then AT&T will be

FLORIDA PUBLIC SERVICE COMMISSION

45

1 selling things at a rate that's actually below its retail rate.

2 And so dPi will be paying more -- even though it's supposed to

3 be getting that same service at wholesale, it's actually paying

4 more for a service that, that AT&T is offering to its customers

5 at retail. So the wholesale rate is higher than the actual

6 effective retail rate.

7 Now obviously if there's enough savings involved, dPi

8 can pass some or all of that on to its own customer. That's up

9 to the discretion of dPi. But, for example, in a case like

10 this where it doesn't get the money, it doesn't get the reduced

11 rate from AT&T, it can't pass it on because then it'll be

12 operating at an actual loss. It will be selling things for

13 less than what it has to pay for them.

14 Now that footnote, I don't think it says what AT&T

15 claims that it says. They're asking you to interpret that or

16 they will be asking you to interpret that footnote in a way

17 that conflicts with federal law. I don't think that's the way

18 that the footnote ought to be interpreted. That's just the way

19 they're asking you to interpret it.

20 COMMISSIONER SKOP: I understand. And I mean, like I

21 say, I think that in the course of, the course of your opening

22 argument, I mean, you touched upon the relevant law, the

23 controlling law, the fact that contracts are, you know,

24 typically construed against the drafter, you know, which is an

25 equitable principle in itself. But also, too, one of the

FLORIDA PUBLIC SERVICE COMMISSION

46

1 things that, that you pointed out was the governing law, and I

2 believe that was on Slide 17 where it talks with state

3 substantive telecommunications law, and I think that's where we

4 come in in trying to make sure that, you know, that in the

5 cases of disagreements that, you know, we consider all the

6 facts and look at what's actually happening.

7 MR. MALISH: Uh-huh.

8 COMMISSIONER SKOP: As opposed to, you know, the just

9 mere technicality or, you know, looking at something. But I

10 just wanted to flesh that out a little bit and I do appreciate

11 your responses, and I think my colleagues have questions.

12 COMMISSIONER McMURRIAN: Commissioner Argenziano.

13 COMMISSIONER ARGENZIANO: You're going to have to

14 forgive me because I am not an attorney, was not as

15 well-educated as my colleague as far as attorney lingo. I'm

16 going to speak the lingo I know because it touches the same

17 base, and anybody watching out there who's not an attorney may

18 feel a little bit like I do sometimes trying to really -- what

19 did -- what was that, and maybe, maybe saying the same thing.

20 But what I see, first of all, I look at the law. Say, hey,

21 what is the law telling me? And what I see that within the

22 short-term promotions that they describe, within the promotion

23 there are qualifications obviously.

24 Now it seems to me that you're saying that you're not

25 being offered the credit for these promotions but you're not

FLORIDA PUBLIC SERVICE COMMISSION

47

1 qualifying for the promotions. That's what I see. You're

2 arguing you are qualifying and I guess by using the blocks.

3 AT&T has got customers who are qualifying and using features.

4 So the next step I go to is, okay, if, if dPi is

5 qualifying, what does it take to qualify? And what I'm looking

6 at is the same thing that the AT&T customer, the end user has

7 to qualify.

8 I have -- and I think maybe you haven't explained to

9 me enough -- I don't see where you qualify. I think the offer

10 is being, it's being offered to you, but I don't see where

11 you're qualifying for the offer. And to me, it seems like

12 maybe in your words because the block -- I mean, the customers

13 may not be the best customers or they may be risky customers.

14 The business has to protect itself, so you want this promotion

15 because you're in that niche, as you say, that may help your

16 company when you have customers that may not be the best

17 customers. But if you don't qualify -- and I think you need to

18 emphasize to me more where you qualify. Because you're -- the

19 end user at AT&T is benefiting from that and, of course, AT&T

20 is because they have a customer who is buying additional

21 features. You're not buying the additional features. You're

22 putting blocks on because these -- it may be the business

23 decision you make because of the niche you're in, but you are

24 benefiting -- but you want to benefit from the promotion

25 without buying, and I, and I just don't see the connection

FLORIDA PUBLIC SERVICE COMMISSION

48

1 where you qualify.

2 MS. TAN: Before Mr. Malish speaks, I'd like to say

3 that I think that perhaps what Mr. Malish can do is tell the

4 Commissioner which witnesses will be discussing that

5 information.

6 COMMISSIONER ARGENZIANO: Thank you.

7 MR. MALISH: Okay. And, Commissioner Argenziano, the

8 question comes down to -- it's a matter of, I guess,

9 interpretation of that language in the promotion as to what is,

10 what is necessary in order to qualify. They're saying that

11 those features are not, those HB -- BCR, BRD and HBG TouchStar

12 blocking features are not features. That's their position.

13 That's their policy that they have adopted and that's a policy

14 that they adopted only after they had made a practice of

15 paying --

16 COMMISSIONER ARGENZIANO: Okay. Can I stop you for a

17 second there?

18 MR. MALISH: Yes.

19 COMMISSIONER ARGENZIANO: Can I stop you? But -- and

20 the way I see that -- because that would be taken into

21 consideration. If you're doing that, if you're offering that

22 promotion for the, maybe the type of feature, not feature, the

23 blocking that is not considered a feature, if you're giving

24 that to somebody else, well, then I would look at that.

25 MR. MALISH: Yes.

FLORIDA PUBLIC SERVICE COMMISSION

49

1 COMMISSIONER ARGENZIANO: But could it be more of

2 oversight and saying just sloppy on the part of AT&T for

3 allowing their own promotion to be taken advantage of and then

4 they realize and say, hey, this is not what we meant to begin

5 with? And I'll, I'll reserve that for the right witness that

6 you may have, but that's the way I'm taking that.

7 MR. MALISH: The point of it is that if AT&T -- the

8 question is how are they going to interpret that? The problem

9 is that they have interpreted it with their own retail users

10 that select nothing but plain old telephone service plus these

11 blocking features. They have given that promotion to their own

12 retail customers. In other words, customers of theirs at

13 retail who submit orders configured exactly the same way that

14 dPi submits orders get the benefit of the promotion but dPi

15 does not. That's what they're -- that's the problem. And --

16 I'm sorry.

17 COMMISSIONER ARGENZIANO: And I thought that ended.

18 I thought from what I read and what I've come to the conclusion

19 was that that to me may have been big mistakes on your own part

20 and then coming to the realization, hey, we're not even

21 verifying what we're giving promotional credits to. And I

22 don't know if that still continues. And I don't know -- I want

23 to put us in the proper -- it may have to be for witnesses

24 coming up. But if you have those witnesses, maybe they can at

25 the time answer those for me on both points.

FLORIDA PUBLIC SERVICE COMMISSION

50

1 MR. CARVER: Yes. Of course. I'm sorry. If I could

2 just respond.

3 Yes. Ms. Tipton will be able to answer those

4 questions.

5 COMMISSIONER ARGENZIANO: Okay. Ms. Tipton.

6 MR. MALISH: And, of course, the problem is not what

7 their policy is but what their practice is. Because their

8 policy may be, geez, our policy is we never give this out and

9 that's their stated policy. But if their practice is they

10 always give it out --

11 COMMISSIONER ARGENZIANO: Uh-huh.

12 MR. MALISH: -- then we're having a problem. All

13 right? Because the practice is what's important, it's the

14 practice.

15 COMMISSIONER ARGENZIANO: Well, Madam Chair, to that

16 point, to the proper witnesses at the proper time I'm going to

17 want some information on when that -- is it still being

18 practiced and is it not and that's --

19 MR. MALISH: And actually this is all in the past.

20 This has gone away.

21 COMMISSIONER ARGENZIANO: Ah, then you just answered

22 my question. Thank you. Okay.

23 COMMISSIONER McMURRIAN: Any other questions?

24 Sure, Commissioner Skop.

25 COMMISSIONER SKOP: And I want to thank Commissioner

FLORIDA PUBLIC SERVICE COMMISSION

51

1 Argenziano for that because she put it in the plain language

2 that I was trying to articulate.

3 COMMISSIONER ARGENZIANO: You did very well.

4 COMMISSIONER McMURRIAN: I think I thank her more

5 than you do as another nonattorney.

6 I think that brings us to the point where we'll hear

7 from the witnesses. So first I'll ask all witnesses present to

8 stand with me and raise your right hand while I administer the

9 oath.

10 (Witnesses collectively sworn.)

11 Thank you. Two other quick reminders. Witnesses are

12 permitted five minutes each to summarize their testimony.

13 We're going to take direct and rebuttal together. And that

14 brings us to dPi; you may call your first witness.

15 MR. MALISH: Thank you, Commissioner. Our first

16 witness is Brian Bolinger.

17 COMMISSIONER McMURRIAN: There in front of the

18 microphone, Mr. Bolinger. That's okay. Take your time.

19 BRIAN BOLINGER

20 was called as a witness on behalf of dPi Teleconnect, LLC, and,

21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MALISH:

24 Q Mr. Bolinger, could I get you to please state your

25 name and address for the record?

FLORIDA PUBLIC SERVICE COMMISSION

52

1 MR. CARVER: Excuse me. I'm sorry to interrupt, but

2 if I could just raise a literal housekeeping matter. I can't

3 really see the witness because they have an apparatus on the

4 table there that's blocking the view. Would it be possible for

5 them to move that so that I could see the witness as he

6 testifies?

7 COMMISSIONER McMURRIAN: We'll get some help with

8 that.

9 MR. CARVER: Thank you.

10 (Pause.)

11 COMMISSIONER McMURRIAN: Can you see him, Mr. Carver?

12 MR. CARVER: Yes.

13 COMMISSIONER McMURRIAN: Thank you. Go ahead,

14 Mr. Malish. Sorry about that.

15 BY MR. MALISH:

16 Q Mr. Bolinger, we were going to have you state your

17 name and address for the record, please.

18 A Sure. My first name is Brian, and that's B-R-I-A-N.

19 Last name is Bolinger, B-O-L-I-N-G-E-R.

20 Q And you work for dPi; correct?

21 A I do.

22 Q And tell us what capacity.

23 A My capacity for dPi Teleconnect is I'm their Vice

24 President of Legal Affairs.

25 Q And did you prepare in this case and prefile direct

FLORIDA PUBLIC SERVICE COMMISSION

53

1 and rebuttal and supplemental testimony?

2 A I did.

3 Q And do you have any changes or corrections to make to

4 this testimony at this time?

5 A Actually the only change that I would have is my

6 first amended direct testimony. I think there's a typo in

7 there that dPi Teleconnect provides services to residential and

8 business customers. We have no business customers. We only

9 provide services to residential customers. Other than that,

10 it's accurate.

11 COMMISSIONER McMURRIAN: Mr. Bolinger, I just wanted

12 to see what page and what line, if you could.

13 THE WITNESS: Page 1, Line 18 begins with the word

14 "provides."

15 COMMISSIONER McMURRIAN: So you would strike "and

16 business"?

17 THE WITNESS: Yes, ma'am.

18 COMMISSIONER McMURRIAN: Okay. Thank you.

19 BY MR. MALISH:

20 Q All right. And so with those changes, if I were to

21 ask you all the questions that are in the testimony, would you,

22 in the written testimony, would you, would your answers be the

23 same as what's there in writing?

24 A Yes.

25 MR. MALISH: Okay. At this point I would like to

FLORIDA PUBLIC SERVICE COMMISSION

54

1 request that the prefiled testimony of Mr. Bolinger be inserted

2 into the record as though read.

3 COMMISSIONER McMURRIAN: Yes. Show that done.

4 Thanks.

5 BY MR. MALISH:

6 Q And, Mr. Bolinger, there are some -- here we go. No,

7 that's not it. Here it is right here. There are some exhibits

8 that are attached to your testimony. Let's see. Those would

9 be -- they're all attached to Steve Watson's. These are all

10 for Steve Watson. Okay. There are no exhibits attached to

11 your testimony, are there?

12 A In what I brought up here I have Christy Siegel's

13 deposition, but that may have been attached to Steve Watson's,

14 not mine.

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FLORIDA PUBLIC SERVICE COMMISSION

62

1 BY MR. MALISH:

2 Q Do you have a summary of your testimony,

3 Mr. Bolinger?

4 A I can provide one, yes.

5 Q Okay. Would you, please?

6 A Sure. Basically my testimony boils down to

7 contradicting exactly what Mr. Carver has said. And I will

8 give you a little history. I know Mr. Malish has done that as

9 well. But in a nutshell this case boils down to the Line

10 Connection Charge Waiver that was operating between January of

11 2003 through mid 2004. And what occurred was we or dPi

12 submitted for three separate promotions during that time. And

13 as is common in the industry, we went back as far as we could

14 and submitted everything in one batch and sent it over to

15 BellSouth. And we did that through Lost Key Telecom, for which

16 Mr. Watson is the owner.

17 On the same day dPi submitted their request a company

18 very similar to dPi submitted identical information. That --

19 the other company was paid in full by BellSouth. And then what

20 we learned subsequently through Christy Siegel's testimony at

21 BellSouth was she was amazed, or I think she used the word

22 "shocked" that the numbers were so high, and so she

23 individually stopped the program.

24 So unbeknownst to us the program had ceased. All we

25 knew is we did not get paid for the credits that we had

FLORIDA PUBLIC SERVICE COMMISSION

63

1 requested or that the other company, which is Budget Phone, got

2 paid for. So month after month I would talk to people at

3 BellSouth and they would tell me, "It'll be on your next

4 month's billing," and it wouldn't show up. And I would call

5 them and say, ""What happened?" "I'm not sure. I don't know

6 what happened. It'll be on next month's billing." It was

7 always next month, next month, next month. It was never, "Hey,

8 we're reviewing the process." It was never, "You've been

9 denied because of." It was always, "You will get it next

10 month." So it grew to several hundred thousand dollars.

11 MR. CARVER: I'm sorry. I'm going to have to object.

12 What the witness is saying now in his last several comments are

13 not anywhere in his testimony. I mean, beginning with the part

14 about ending the program, Ms. Siegel up 'til now, none of that

15 is in either his direct or rebuttal testimony.

16 COMMISSIONER McMURRIAN: Mr. Malish? I mean, I can

17 add while you think about it that the summary is supposed to be

18 a summary of the testimony. So if it is outside the scope,

19 then I think we would ask the witness to stay within the scope

20 of his testimony that's prefiled. But you're welcome to

21 respond to that, to the objection.

22 MR. MALISH: I wasn't, I wasn't paying that much

23 attention. I'm sorry.

24 THE WITNESS: Ma'am, could I respond?

25 MR. MALISH: But, you know, Mr. Bolinger, if you'll

FLORIDA PUBLIC SERVICE COMMISSION

64

1 summarize your testimony that's written and then --

2 THE WITNESS: I thought I was.

3 MR. MALISH: Okay. Well, and then if you, if you

4 would further like to respond to, for example, some of the

5 questions that Commissioner Argenziano or Commissioner Skop

6 asked during the, right before this, then you can do that, too.

7 THE WITNESS: Sure. Okay.

8 MR. MALISH: We'll get to that in a second.

9 THE WITNESS: Okay. Well --

10 COMMISSIONER McMURRIAN: Just -- hold on just a

11 second. I'll look to staff.

12 MS. CIBULA: Well, it appears that --

13 COMMISSIONER McMURRIAN: Should --

14 MS. CIBULA: -- that their attorney told him to stick

15 to the summary of his testimony and that's what they're going

16 to do. So I think we can --

17 COMMISSIONER McMURRIAN: Okay. We'll move on.

18 THE WITNESS: Well, I thought I was, so I will try to

19 the best I can.

20 So in any event, it grew to a large amount and what

21 we did was we basically withheld payment. Up until then we had

22 been paying 100 percent, so we withheld payment because we

23 tried to get a decision made one way or the other. We didn't

24 know what was going on.

25 At that point we were submitted with demand letters

FLORIDA PUBLIC SERVICE COMMISSION

65

1 for payment and forced to file at the -- initially we just

2 filed in North Carolina at the Commission and subsequently in

3 all other states. Ironically, within seven days of filing in

4 North Carolina two of the three promotions were paid nearly in

5 full, which left the Line Connection Charge Waiver.

6 So -- but during this time when they, when they were

7 telling us why they were denying it, which started about in

8 April, they would give us several different excuses or, as

9 Mr. Malish points out, "yeah, buts." And so in each one we

10 would shoot them down. The first one, I believe, actually was,

11 "Well, all of those are UNE-P customers." And our response

12 was, "At a maximum our UNE-P customer count was 8 percent of

13 our total customer base, so how can 100 percent of the

14 promotions be all UNE-P customers? That doesn't make any

15 sense." So that was quickly withdrawn.

16 Then they would say, you know, several different

17 things up to "They're not features." And I would say, "Well,

18 in your tariff they're listed as features. On your website

19 they're listed as features. In UNE-P you charge them as

20 features. When communicating with you, you talk about them as

21 they are features. So how are they not features?" And then it

22 changed to, "Well, you didn't pay for them."

23 MR. CARVER: I'm sorry. Objection. None of this is

24 in his testimony either.

25 COMMISSIONER McMURRIAN: Mr. Malish, do you want to

FLORIDA PUBLIC SERVICE COMMISSION

66

1 show us where this discussion is in the testimony, or respond

2 to that however you wish?

3 MR. MALISH: I'm sorry.

4 BY MR. MALISH:

5 Q Mr. Bolinger, if that's not in your testimony, you

6 can look at your testimony.

7 A Okay.

8 Q And then I know that the other Commissioners had

9 questions that I bungled answering and I will direct you to

10 those, too. But try to stick to what's in your testimony.

11 A I'm trying to. I haven't memorized it verbatim. I'm

12 just giving --

13 COMMISSIONER McMURRIAN: And, Mr. Bolinger, if it

14 makes it easier, we can come back to the Commissioners'

15 questions at the time the Commissioners ask questions, too.

16 You don't have to try to fit that in your summary. If you want

17 to just summarize -- we have about -- I'll give you another

18 minute because of the objections.

19 THE WITNESS: Okay.

20 COMMISSIONER McMURRIAN: But I think you need to wrap

21 up.

22 THE WITNESS: Sure. Sure. And I thought -- I've

23 been deposed so many times and questioned so many times, unless

24 you -- it's hard to tell which is what.

25 But, so in a nutshell, the excuse after excuse, to be

FLORIDA PUBLIC SERVICE COMMISSION

67

1 perfectly honest, I'm not exactly sure -- well, I can't say

2 that. Never mind.

3 So then it has come down to basically us saying that,

4 yes, we do qualify and we were wrongly denied those promotional

5 credits that have been paid out to not only their own customers

6 but to also other CLECs.

7 COMMISSIONER McMURRIAN: Mr. Malish, do you tender

8 the witness for cross?

9 MR. MALISH: I want to follow up a couple of things

10 with Mr. Bolinger about the questions that Commissioner Skop

11 and Commissioner Argenziano --

12 COMMISSIONER McMURRIAN: Mr. Malish, we'll just do

13 that at the time that the Commissioners jump in and ask

14 questions, and we can do that really at any time, the

15 Commissioners can jump in with their questions, but you don't

16 need to pose them to him.

17 MR. MALISH: Okay. Okay. Then we do.

18 COMMISSIONER McMURRIAN: Thank you.

19 Mr. Carver. Or if Commissioners want to jump in now,

20 that's perfectly appropriate, too. It's either way.

21 Commissioner Argenziano, would you like -- sure.

22 COMMISSIONER ARGENZIANO: I just want to clarify with

23 you. You're saying that you felt, or you're saying that you

24 felt that AT&T -- actually not felt. You said that AT&T paid

25 almost in full for those promotions which now they're saying

FLORIDA PUBLIC SERVICE COMMISSION

68

1 were never meant to be part of that promotional package but

2 they paid that.

3 THE WITNESS: Up until the denial of our claim for

4 the Line Connection Charge Waiver, BellSouth, to my knowledge

5 BellSouth was paying other CLECs very similar to dPi that

6 ordered exactly the same way dPi did.

7 COMMISSIONER ARGENZIANO: No, that's not the

8 question. The question is I think you said that they paid dPi

9 almost in full for the --

10 THE WITNESS: There were three, there were three

11 promotions initially at issue in this case and in all cases in

12 all BellSouth states. There's a Line Connection Charge Waiver,

13 there's a Secondary Service Charge Waiver, and then there was,

14 yeah, two features for free. So all you had to do is order

15 basic service, you got two features for free.

16 They didn't -- for, you know, nine months or so we

17 were not paid on any of those that we filed. We were, we were

18 granted zero credits or almost zero credits. There's always

19 credits on a bill.

20 COMMISSIONER ARGENZIANO: Okay. Okay. If I can,

21 because I'm trying to -- at that time dPi had two features to

22 the end user? Was the end user -- did -- let me put it this

23 way. Did BellSouth pay for features that the end user had

24 requested? Is that the payment you're talking about?

25 THE WITNESS: What happens is, as Mr. Malish kind of

FLORIDA PUBLIC SERVICE COMMISSION

69

1 explained in his opening, we are charged 100 percent of the

2 wholesale rate in month one. So if I order, let's say two

3 features, I order -- I call BellSouth.

4 COMMISSIONER ARGENZIANO: As dPi or a customer, end

5 user?

6 THE WITNESS: As an individual. I call as an

7 individual, as a BellSouth end user, I call BellSouth and I

8 order basic service. They will tell me, "Yes, sir, you get two

9 features for free. What would you like?" And I would order

10 those and I would not be charged.

11 As dPi Teleconnect when I call BellSouth and say "We

12 have a customer that ordered basic service and we want these

13 two features placed on them," and when they say features here

14 in this context, they're talking about Call Waiting, Caller ID,

15 Three-Way Calling, you know, those type of, of features you can

16 add to your line, they will charge dPi Teleconnect in full for

17 those features, the retail price for those features. So if

18 Caller ID is ten bucks and Call Waiting is $5, we will get

19 charged $15 for those features. We have to then go back to

20 them and say, "Wait a minute. Wait a minute. See this line

21 here on our bill? This line should have been under your two

22 features for free plan, so please pay us back our money that

23 you charged us." They did not do that for a period of nine

24 months. When we filed in North Carolina, within a week the two

25 features for free and the Secondary Service Charge Waivers were

FLORIDA PUBLIC SERVICE COMMISSION

70

1 nearly paid in full.

2 COMMISSIONER ARGENZIANO: Okay. Thank you.

3 THE WITNESS: That is what I meant by that.

4 COMMISSIONER McMURRIAN: Commissioner Skop.

5 COMMISSIONER SKOP: Thank you, Madam Chair.

6 I just wanted to, I guess, clarify in your position,

7 dPi's position is that the blocks qualify as features; is that

8 correct?

9 THE WITNESS: Yes, sir.

10 COMMISSIONER SKOP: Okay. And previously I think, as

11 my colleague Commissioner Argenziano has fleshed out, you guys

12 initially submitted the paperwork for getting the promotional

13 refunds or, for lack of a better word, whatever they were, and

14 some of those at least initially were approved; is that

15 correct?

16 THE WITNESS: For us, no.

17 COMMISSIONER SKOP: Not for you? Okay.

18 I guess in your opinion, in looking at the -- there

19 appears to be a tension again between the blocks and the

20 features, but also to the additional requirements that, you

21 know, the statutory requirements and then you have the

22 contractual issues and then you have this footnote. But in

23 equity in your opinion is it fair for a company like dPi --

24 although, you know, it's implied or seems to be on your

25 arguments that it's implied that you qualified for promotions,

FLORIDA PUBLIC SERVICE COMMISSION

71

1 I think that it probably turns on blocks versus features. But

2 in your opinion is it fair for a company like dPi to

3 essentially request that this money be refunded but it not be

4 passed through to the consumer? Ultimately you guys are trying

5 to leverage or arbitrage or in plain terms just profit by this

6 promotion. Is that true?

7 THE WITNESS: That is not true.

8 COMMISSIONER SKOP: Okay. Could you please explain

9 that?

10 THE WITNESS: Absolutely. And Mr. Carver, I'm sure,

11 will ask me this question. He will ask, "At the time did you

12 pass the promotions through to your customers?" And my answer

13 will be, "No, because we did not get the promotions." Had we

14 gotten the promotions, yes, absolutely, we would have put them

15 into our model and we would have passed them through to our

16 customers. However, if you don't pay it, we can't pass it

17 through because you're talking about, oh, somewhere in the

18 neighborhood of a hundred thousand dollars a month of pure cash

19 flow, and you can't support your business that way.

20 We have -- currently today there are several

21 promotions going on whereby BellSouth or AT&T, they're paying

22 100 percent. Those promotions are passed through to the

23 customer. We have recently become ETC certified in many states

24 and are offering a Lifeline product for a dollar to our

25 customers who qualify. We try -- it doesn't make business

FLORIDA PUBLIC SERVICE COMMISSION

72

1 sense whatsoever not to pass them through because we have

2 competitors out there and we have AT&T out there and everybody

3 else who's passing them through. So, no, that's absolutely not

4 true. We do not try and profit off of it. But we have to

5 first make sure we're going to get paid or we'll go out of

6 business.

7 COMMISSIONER SKOP: Okay. So, so based on that, let

8 me make sure that I understand what you said. To the extent

9 that if, if you qualified for the promotion and those funds

10 were paid to dPi from BellSouth, that those amounts would be

11 passed through to the consumer and would not be retained by

12 dPi.

13 THE WITNESS: Yes. The way the process works -- and

14 it's different in BellSouth territories than it is in most

15 every other state. Because there is this lag time and forms

16 you have to fill out and approval you have to get from

17 BellSouth before they will refund your money, the process takes

18 a little longer to pass through to the customer than, let's

19 say, it does in a former SBC state where you put, where you put

20 the code on the form and it automatically gives you the

21 discount. You can easily then pass that through to the

22 customer.

23 Here, because you don't know when they -- if, if

24 BellSouth were to come out with a promotion today and we read

25 the promotion, read all the requirements of the promotion,

FLORIDA PUBLIC SERVICE COMMISSION

73

1 looked at our product offerings and said, okay, we qualify for

2 this promotion, we have absolutely no idea if they're going to

3 pay it until they start. And they're usually three to four

4 months in arrears. And so for a period of three to four months

5 we will not pass that through because we don't know if

6 BellSouth is going to honor their promotion to us. Once they

7 start paying on a regular basis, we change our pricing, offer

8 it to the customer and pass that through. But until then we

9 simply cannot because we can't afford the cash flow crunch

10 if -- you know, in this case it's been four years and they

11 haven't paid it yet.

12 COMMISSIONER SKOP: Thank you. And just one quick

13 follow-up.

14 Again, I think the reason I'm asking that is because

15 it's very important for me and I think probably also my

16 colleagues to understand the motivation, the true motivation of

17 exactly what's going on here. Because, again, you know, it

18 would be somewhat skeptical on face absent, you know, some of

19 the explanation that you've provided to assume that by, you

20 know, asserting that blocks are features and trying to avail

21 yourselves of a promotion that may or may not be the intent of

22 the promotion that AT&T sees it in their eyes. But, you know,

23 on face it seems, you know, somewhat opportunistic to the

24 extent that if that weren't -- you know, why are you doing that

25 and why -- you know, is it for yourself or is it for your,

FLORIDA PUBLIC SERVICE COMMISSION

74

1 truly for the customers? And it seems like you've added some

2 clarity to that. But, you know, at least on face it seems very

3 skeptical by virtue of it's almost as if you're trying to

4 exploit or leverage a loophole to take advantage of something.

5 And, you know, again, it's important to me to understand the

6 motivation behind that. Is that for the corporate benefit or

7 is it truly for the benefit of the customers, which would be

8 consistent with the flow down through an AT&T promotion offered

9 directly to its consumers. Thank you.

10 COMMISSIONER McMURRIAN: Commissioner Argenziano.

11 COMMISSIONER ARGENZIANO: Okay. A couple of things.

12 One, you mentioned a website where AT&T or BellSouth, I guess,

13 lists features.

14 THE WITNESS: Uh-huh.

15 COMMISSIONER ARGENZIANO: And I've been trying to

16 find that. And I found something that says, "What is a

17 feature?" And it basically says, "A feature is an enhancement

18 to a product. A product may have one or more features. Caller

19 ID, Caller Waiting Deluxe and Three-Way Calling are examples of

20 features." And I'd like to know if there's another spot where

21 you're referring to.

22 THE WITNESS: Yes, ma'am, there is. I have a piece

23 of paper over there with a Web address that will take you right

24 to it.

25 COMMISSIONER ARGENZIANO: Okay. I'll take that.

FLORIDA PUBLIC SERVICE COMMISSION

75

1 THE WITNESS: Where it tells you the TouchStar

2 features.

3 COMMISSIONER ARGENZIANO: But the other thing I want

4 to go back to, because to me it comes back to what the law

5 says, what the promotion includes, and then what, how AT&T or

6 BellSouth is practicing that promotion. And what you said

7 before when I asked you about the features, you said that in

8 cases where BellSouth had end users that had two features, that

9 had basic service and then had two features which BellSouth was

10 giving for free, I think that's what you said, and you're

11 saying dPi had the exact same. Meaning the exact same as

12 features or are you adding the blocked, the blocks in as

13 features?

14 THE WITNESS: I'm adding, in that case with the two

15 features for free, features -- and there is an argument over

16 what is a feature. So that would be AT&T's definition of a

17 feature, meaning the customer had basic service and Call

18 Waiting and Caller ID.

19 COMMISSIONER ARGENZIANO: Right. And with all due

20 respect, it's their promotion, so I guess they can include what

21 they want in their promotion. But what I'm trying to get at is

22 if there were instances that they were the exact same features.

23 Let's get blocks off the table.

24 THE WITNESS: Well, and that's what I'm saying, they

25 were. Yes, ma'am.

FLORIDA PUBLIC SERVICE COMMISSION

76

1 COMMISSIONER ARGENZIANO: Okay. They were not

2 blocks. We're talking about additional features, there's Call

3 Waiting, Caller ID or something like that, and you see that

4 BellSouth gave the two features for free. And in that case

5 it's -- if that were the case, then it's an identical -- this

6 is really what I'm trying to get, Madam Chair, is it the same?

7 Because what I heard before was there was blocking, which I

8 think is different than a feature, especially if it's not

9 charged for. But what I'm trying to get at and I want to make

10 clear and make sure that that's what you're saying is that they

11 were identical features, putting blocks aside, as BellSouth was

12 giving or that you think BellSouth was giving to their end

13 users, which you felt you had a right to get, those end users

14 had a right to get the benefit of.

15 THE WITNESS: Yes.

16 COMMISSIONER ARGENZIANO: Is that what you're saying?

17 THE WITNESS: In that situation they, they withheld

18 payment of those for nine months, and not until we filed in

19 North Carolina was it paid.

20 COMMISSIONER ARGENZIANO: And, Madam Chair, if he can

21 at the right time get me that website, I'd like to see that,

22 please. Thank you.

23 COMMISSIONER McMURRIAN: Perhaps someone can -- can

24 someone get that for you, Mr. Bolinger?

25 THE WITNESS: I've got it. Mr. Malish has it in his

FLORIDA PUBLIC SERVICE COMMISSION

77

1 hand.

2 COMMISSIONER McMURRIAN: Okay. I think we might as

3 well do it now.

4 MR. MALISH: Can we put it on the projector?

5 COMMISSIONER McMURRIAN: I suppose.

6 THE WITNESS: Okay. This is off, as you can see,

7 it's off of AT&T/BellSouth's website where it lists BCR and BRD

8 both as Touchstars, which is, which TouchStar indicates that

9 they are TouchStar features.

10 COMMISSIONER McMURRIAN: Does that document have a

11 Web address on it, Mr. Bolinger?

12 THE WITNESS: I think it's at the bottom.

13 COMMISSIONER McMURRIAN: Okay.

14 THE WITNESS: There it is.

15 MS. TAN: Commissioners, does someone want to make

16 that into the record, read that into the record, make it into

17 an exhibit?

18 COMMISSIONER McMURRIAN: Mr. Bolinger, if you can, if

19 you can read it, go ahead and read it into the record.

20 MR. MALISH: I'll read it in. Oh, all right. Well,

21 you can. Go ahead.

22 COMMISSIONER McMURRIAN: I think it's best if the

23 witness reads it in. Go ahead, Mr. Bolinger.

24 THE WITNESS: The URL of that document is

25 https://apps.interconnection.BellSouth.com/usoc/

FLORIDA PUBLIC SERVICE COMMISSION

78

1 usoc\_keyword.jsp.

2 COMMISSIONER ARGENZIANO: Ms. Tan, is that -- or,

3 Ms. Cibula, procedurally how do we address this?

4 MS. CIBULA: Someone might want to make that page an

5 exhibit in the record since there seems like there's other

6 information on that web page that is being pointed to.

7 MR. MALISH: Commissioner McMurrian, we can just mark

8 that particular one as the next exhibit in order and label it

9 as a screen shot of the Web site and then the actual page will

10 be in your record.

11 COMMISSIONER McMURRIAN: You want to make it a

12 late-filed exhibit of some sort or is it just to mark this page

13 he has with him?

14 MS. CIBULA: They can mark that page right now and

15 enter it into the -- identify it and --

16 COMMISSIONER McMURRIAN: Okay. Let me -- so,

17 Mr. Malish --

18 MR. CARVER: Could we get a copy of that if it's

19 going to be an exhibit?

20 COMMISSIONER McMURRIAN: I think we need to. Should

21 we perhaps, maybe we should take --

22 MS. CIBULA: Maybe we should take a break.

23 COMMISSIONER McMURRIAN: Okay. You want to take ten

24 minutes? Okay. We'll take a ten-minute break and try to get

25 that in order and we'll be back in ten. Thanks.

FLORIDA PUBLIC SERVICE COMMISSION

79

1 (Recess taken.)

2 We'll go back on the record. And, Mr. Malish, I

3 think we probably need to mark this exhibit, and I think it

4 would be Exhibit Number 27. Is that --

5 MR. MALISH: Yes, ma'am.

6 COMMISSIONER McMURRIAN: Okay. And we'll need to put

7 a short title. How about AT&T USOC Lookup Tool just for short.

8 MR. MALISH: Yeah. That's fine.

9 MR. CARVER: And, I'm sorry, what was the number?

10 COMMISSIONER McMURRIAN: 27.

11 MR. CARVER: Thank you.

12 (Exhibit 27 marked for identification.)

13 And do the Commissioners have any other questions at

14 this time? Or we'll go on to Mr. Carver, and if there are

15 questions later, we can do that.

16 Okay. I believe, Mr. Carver, you're up. Thank you

17 for being patient.

18 MR. CARVER: Thank you.

19 CROSS EXAMINATION

20 BY MR. CARVER:

21 Q Good morning, Mr. Bolinger. My name is Phil Carver

22 and I represent AT&T. Before I get to the questions that I

23 have prepared, I would ask a couple of things that are

24 follow-ups to what you testified about just now.

25 In response to a question from Commissioner Skop, I

FLORIDA PUBLIC SERVICE COMMISSION

80

1 believe you said that when AT&T gives you credits, then you

2 pass them on to your customer; is that correct?

3 A Yeah. We change our models to pass -- once we know

4 that the, the promotions for which we file will be paid on a

5 regular basis, then we change our model to pass those through

6 to our customers.

7 Q Okay. Let me ask you, do you remember testifying in

8 a similar proceeding in North Carolina on March the 1st, 2006?

9 A I do remember that testimony.

10 Q Okay. I've got -- if I may approach the witness, I'd

11 like to take him a copy of the transcript of that hearing.

12 Okay. Mr. Bolinger, if you would look at the page

13 that I've opened that transcript to, it's Page 64 beginning on

14 Line 16 going through Line 24. Do you see that? Are you

15 there?

16 A Line 24?

17 Q No. Line 16.

18 A Oh, I'm sorry.

19 Q Yes, if you'll begin there. I'm going to read the

20 question and answer.

21 A Uh-huh.

22 Q Question, "And when BellSouth gives dPi those

23 credits, dPi doesn't pass those on to its end users, does it?"

24 "Well, it's been impossible to pass those on to our

25 end users because we've had to wait ten months to get them. In

FLORIDA PUBLIC SERVICE COMMISSION

81

1 the prepaid environment the average customer sticks around from

2 six to eight months. So by the time we actually receive the

3 dollar amount, the customer is most likely already gone so we

4 can't pass it to the customer."

5 Is that what you testified in North Carolina?

6 A Yes. I testified that if we waited ten months, the

7 typical prepaid customer would have disconnected from us and

8 there is no customer to pass it on to.

9 Q Right. So in North Carolina you testified that it

10 was impossible to pass the promotional credits on.

11 A Yeah. When AT&T waits ten months to pay their

12 promotional credits, it is impossible. Yes.

13 Q Okay. Now in Ms. Tipton's testimony she states

14 that -- this is on Page 4 of her direct testimony. She states

15 that in Florida AT&T has paid $83,000 worth of credits to dPi

16 through April of 2007. Do you take issue with that number?

17 A Total for all credits since the beginning of time?

18 Q Yes. Through April of 2007.

19 A No, I don't take issue with that. I don't know what

20 that number is, but --

21 Q So is it your testimony that every time one of those

22 $83,000 of credits was given to a customer, that you gave that

23 customer back to the -- you gave that credit back to the

24 customer that ordered the service that generated the credit?

25 Is that your testimony?

FLORIDA PUBLIC SERVICE COMMISSION

82

1 A My testimony is --

2 Q I'm sorry, sir. Could I have a yes or no, please?

3 Is that what you're telling us?

4 A No. What I have told you is that when we are

5 confident that AT&T will pay the promotion on a regular and

6 systematic basis in accordance with the promotion, that we

7 change our pricing model to reflect the reduced price to dPi.

8 It does not say that when John Smith orders service from us,

9 that we will automatically give him that promotion. Because

10 until we understand if AT&T is going to pass that promotion to

11 us, which is why we are here, we cannot change our model to

12 reflect the promotional pricing.

13 Q Have you given -- well, okay. So you're talking

14 about future pricing. My question though is this $83,000 of

15 credits that have been given to you, did you pass those back to

16 the customers that ordered the service that generated the

17 credits, yes or no?

18 A I have no idea.

19 Q Okay. And in Ms. Tipton's testimony she also says

20 that throughout the region we paid dPi $600,000 in credits.

21 You also, I assume, have no idea whether you passed any of

22 those back to the customers; would that be correct?

23 A If you're asking if I passed them down individually

24 to each individual customer, I have no idea because I don't

25 know the retention of those customers or anything else.

FLORIDA PUBLIC SERVICE COMMISSION

83

1 What I can tell you is that once AT&T decides to

2 start paying the promotions systematically and regularly, we

3 change our pricing model to reflect those promotions in our

4 pricing.

5 Q Okay. But just so we're clear, I'm not talking about

6 future pricing and different customers. I'm saying that, you

7 know, John Smith orders the line. As a result of that line you

8 get a $30 credit.

9 A As AT&T --

10 Q I'm sorry. I'm not through, sir.

11 A Oh, I'm sorry. I thought you were.

12 Q I'm sorry. I paused because I was trying to frame my

13 question. My fault.

14 Do you take that $30 and give it back to John Smith

15 if AT&T gives it to you?

16 A We do not do it on an individual customer basis. We

17 do it on a package basis if AT&T is paying the promotion. Now

18 we have to wait because, unlike the other ILECs in the country,

19 AT&T does not notify us if we qualify up-front. We have to

20 wait anywhere from 90 to 120 days before we get the decision

21 that, yes, you do qualify. But typically, for whatever reason,

22 we are only paid about 75 percent with no reason given as to

23 why 25 percent was denied. So if you would like us to pass

24 100 percent on to our customers, I would say that we would need

25 to get paid 100 percent. We pass everything that we know we

FLORIDA PUBLIC SERVICE COMMISSION

84

1 are going to get systematically and regularly in arrears

2 because it's not done real-time like you all do with your

3 customer, in arrears. Then we pass that through to our

4 customers who order that same package, we put the model

5 together, whereby customers who order that package will get the

6 reduced price. If you want to know if I paid John Smith, I

7 have no idea.

8 COMMISSIONER McMURRIAN: Mr. Carver, I want to jump

9 in. Commissioner Argenziano has a question.

10 COMMISSIONER ARGENZIANO: Yes. And I, what I need to

11 know here -- regardless of whether we like the fact if dPi

12 takes the money and sends it back down to the end user or not

13 is not my question, I think, at this point. I'm trying to

14 figure out is the law or the promotion specific to them giving

15 back to the end user? Because if not, I don't see where it's

16 pertinent at this point. What I'd like to know is --

17 MR. CARVER: Well, yes, I think it is relevant.

18 COMMISSIONER ARGENZIANO: I'm not saying it's not

19 relevant.

20 MR. CARVER: Yes, ma'am.

21 COMMISSIONER ARGENZIANO: I'm trying to go to the

22 point, if it's not specified in law or in your promotion that

23 it go back to the end user, then it's not the point.

24 MR. CARVER: And I'd like to respond to that. This

25 is why I think it's important. The law does not specifically

FLORIDA PUBLIC SERVICE COMMISSION

85

1 require that they give it to the customer. But certainly when

2 Congress passed the Act and the FCC interpreted the Act, they

3 contemplated that it would be passed on to the customer because

4 the whole point was that CLECs, you know, should be allowed to

5 price compete.

6 Now if you're asking is there a legal requirement?

7 No. But here's why it's important.

8 COMMISSIONER ARGENZIANO: Madam Chair, can I -- and I

9 don't mean to cut you off and I'll give you every opportunity,

10 and I'm not taking defense on whether it's right or wrong. I'm

11 looking at a company that maybe takes customers that are not

12 the best, that other people don't want, and maybe there's a

13 reason sometimes they don't pass on. So I'm not judging that.

14 I'm trying to stick to, you know, understanding what is at

15 point here, and I'm not sure if it's not required by statute or

16 promotion why it would be at point. That's all I'm -- I'm not

17 making judgment on it one way or the other. I'd rather it go

18 back to the end user always.

19 MR. CARVER: Right. And if I may respond to that.

20 The reason it's relevant is because, our position in this is

21 that under the language of the interconnection agreement the

22 end user has to place an order. And the way dPi conducts their

23 business, the end user doesn't place an order and they have no

24 idea what dPi is doing. Since they don't get the credit back,

25 that doesn't alert them to this entire process. So, you know,

FLORIDA PUBLIC SERVICE COMMISSION

86

1 I'm not saying they have to give it back, but it's just simply

2 evidence that goes to the fact that they're not end user

3 orders.

4 COMMISSIONER ARGENZIANO: Madam Chair, one more and

5 I'll move on. And I understand that because I believe that the

6 end -- I believe that they have to place an order also to

7 trigger the promotion. But it doesn't, still doesn't -- I'm

8 not even going to belabor it. I think I made my point and just

9 trying to -- I understand what you're saying. When the end

10 user places the, the order, dPi then -- oh, God, I'm going to

11 get it all messed up. You understand my point is what I'm

12 saying.

13 MR. CARVER: Yes, ma'am.

14 COMMISSIONER ARGENZIANO: I understand where you're

15 going with the end user having to place the order and not just

16 dPi placing the order.

17 MR. CARVER: Yes, ma'am. Yes, ma'am.

18 COMMISSIONER ARGENZIANO: But that's like two

19 different things to me.

20 MR. CARVER: And, again, we're not arguing that

21 they're legally required to give it to the end user. We're

22 just saying that that is evidence of the fact that the dPi

23 customer doesn't place an order.

24 BY MR. CARVER:

25 Q Okay. Mr. Bolinger, I'd like to ask you about the

FLORIDA PUBLIC SERVICE COMMISSION

87

1 document that's been marked as Exhibit 27, the one that was

2 just put up on the overhead. Do you have that in front of you?

3 A Okay.

4 Q Now if you go down to the bottom where it says, "BBC,

5 TouchStar, Block BusyConnect," and then there are other codes,

6 and for each it begins with the word "TouchStar" then goes into

7 the blocking, is the word "feature" anywhere in that?

8 A The word -- I do not see the word "feature" anywhere

9 in there.

10 Q Okay. And the word "feature" isn't anywhere on this

11 document at all, is it?

12 A No. The word "TouchStar" is, which is what the

13 document contemplates.

14 Q Okay. So your position is that anything that comes

15 under the general category of TouchStar is necessarily a

16 feature.

17 A No. In the original promotion, in the tariff which

18 was applicable at the time, which was a year prior to the

19 tariff that you all passed out a little earlier which was dated

20 December 2004, which was after all of this occurred, I believe

21 the promotion said that in order to get the Line Connection

22 Charge Waiver you had to purchase basic service and two

23 TouchStar features, which was subsequently removed in the

24 December tariff that you passed out. And so if you look for --

25 when you have -- you have to understand, when we are trying to

FLORIDA PUBLIC SERVICE COMMISSION

88

1 figure out if we qualify for a promotion or not, there's two

2 things you can do.

3 MR. CARVER: I object. This is not responsive. I

4 mean, I know the witness is entitled to explain. But my

5 question is just on this document are the blocks identified as

6 features? And he's gone off an entire explanation about some

7 history that has nothing to do with my question. I mean, if I

8 could just have an answer to the question, are blocks

9 specifically identified as features on this document?

10 THE WITNESS: Are blocks specifically -- no, they're

11 identified as Touchstars.

12 BY MR. CARVER:

13 Q So that's a no?

14 A I said, no, they are identified as Touchstars.

15 Q Sorry. I didn't hear that.

16 Now I think you said earlier that dPi provides only

17 residential service in Florida?

18 A Yes. Residential service throughout the country.

19 Yes.

20 Q And Florida would be the same; correct?

21 A Yes.

22 Q So when you serve these customers in Florida, do you

23 serve all of them by reselling AT&T's services?

24 A I'm not exactly sure I understand that question. We,

25 we serve AT&T -- we serve whatever the predominant incumbent

FLORIDA PUBLIC SERVICE COMMISSION

89

1 is. We have agreements with most. And it may be under resale

2 or it may be under local wholesale depending on what the

3 customer wants to purchase.

4 Q In Florida do you provide any service through UNEs?

5 A Off -- currently?

6 Q Yes.

7 A Off the top of my head, I don't know. I believe we

8 are, are licensed, but I don't know if we have any packages

9 that we are actively selling customers that are on the UNE

10 platform or the local wholesale platform. No.

11 Q Okay. When a dPi end user orders basic local

12 service, dPi automatically puts the BCR, BRD and HBG blocks on

13 the end user's line; correct?

14 A Yes.

15 Q And when dPi places these blocks on customers' lines,

16 you don't ask the customers' permission to do that, do you?

17 A No. When you order service, there are several --

18 there's a litany of things that you place on customer accounts.

19 And so we don't line, go item by item and ask them if we could

20 place each line item on their account. No.

21 Q Well, do you specifically tell the customer that

22 you're putting the blocks on their line?

23 A In our pricing patterns --

24 Q I'm sorry. Could I have a yes or no? Do you

25 specifically tell the customer --

FLORIDA PUBLIC SERVICE COMMISSION

90

1 A Well, it depends.

2 Q -- you're putting the blocks on their line?

3 A It depends. Most likely no, but it still depends.

4 Q Do you remember giving your deposition in the North

5 Carolina proceeding on February 23rd, 2006?

6 A Yes.

7 Q Okay. I'd like to give you a copy of that

8 deposition.

9 A Okay. Are we done with this one?

10 Q Yeah. There may be more, so why don't you hold on to

11 it. Just put it to the side. You'll need it eventually.

12 You're being asked about that one now.

13 Okay. I'd like for you to look at Page 90 of your

14 deposition in North Carolina, the question and answer beginning

15 at Line 7 and ending at Line 12.

16 Question, "Does dPi specifically tell its end user

17 customer that it's putting those blocks on?"

18 Answer, "No. I think it's pretty much understood in

19 the prepaid industry. That's why it's prepaid."

20 Now is that the testimony that you gave under oath in

21 North Carolina?

22 A Absolutely. We do not specifically have any rules or

23 regulations in place where we instruct our call center reps to

24 go through line item by line item.

25 Q Okay. And after you put the block on the customer's

FLORIDA PUBLIC SERVICE COMMISSION

91

1 line, the bill that you send to the customer doesn't indicate

2 that the block is on the line, does it?

3 A No.

4 Q And dPi doesn't send the correspondence to the

5 customer to indicate that the blocks are on the customer's

6 line, does it?

7 A No.

8 Q So when dPi puts a block on the customer's line

9 without the customer's knowledge, without the customer's

10 consent and the customer knows nothing about it, then obviously

11 the customer hasn't ordered the block, have they?

12 MR. MALISH: Objection. Form.

13 THE WITNESS: I would say that we are no different

14 than AT&T in the sense that if a customer calls AT&T and orders

15 basic service, AT&T does not tell the customer that they did

16 not order Caller ID, does not put nonordered Caller ID on the

17 customer's bill and does not send them a letter saying,

18 "Customer, do you realize you did not order Caller ID?"

19 BY MR. CARVER:

20 Q So your answer is, no, the customer is not placing an

21 order, your customer, under those circumstances; is that

22 correct?

23 A No, my answer is not no. The customer absolutely is

24 placing an order.

25 Q Well, the customer is placing an order for basic

FLORIDA PUBLIC SERVICE COMMISSION

92

1 local service. My question was isn't it true that they are not

2 placing an order for blocks, yes or no?

3 A They are not specifically placing an order for

4 blocks. No.

5 Q Thank you.

6 COMMISSIONER McMURRIAN: Hang on a second,

7 Mr. Carver.

8 Commissioner Skop.

9 COMMISSIONER SKOP: Thank you. And I apologize for

10 doing this because normally I wouldn't interrupt your

11 cross-examination, but just to that same point that was made,

12 when a customer signs up for basic service, are you disclosing

13 that your conduct in terms of putting in the things to qualify

14 for the promotion, is the customer even aware of that?

15 THE WITNESS: Probably -- most likely -- well --

16 COMMISSIONER SKOP: Yes or no.

17 THE WITNESS: It --

18 COMMISSIONER SKOP: Yes or no.

19 THE WITNESS: I would say if we are getting paid

20 regularly, the answer is yes.

21 COMMISSIONER SKOP: Listen. Yes or no, is the

22 customer aware that you're seeking a rebate on their behalf?

23 THE WITNESS: I'm sorry, Commissioner. That's not a

24 yes or no question because we don't -- can -- if I may

25 elaborate just a little bit.

FLORIDA PUBLIC SERVICE COMMISSION

93

1 COMMISSIONER SKOP: Well, it's very, very important

2 to me because, again, I think --

3 THE WITNESS: I understand. I'm sorry.

4 COMMISSIONER SKOP: Just hold on. Let me speak.

5 Okay?

6 THE WITNESS: I'm sorry.

7 COMMISSIONER SKOP: Just be quiet for a second.

8 Commissioner Argenziano raised an excellent point

9 about the relevance of, you know, being able to -- whether the

10 rebate is passed down to the consumer or not and that's a very

11 valid question and that's just part of the intent. The other

12 part of this is whether legally they qualify to, to put the

13 hand in the cookie jar and tap the promotion. I understand

14 that. But the bottom line is part of our job is to look out

15 for the consumer, and if you're taking a unilateral action on

16 your own for your own profit of the company at the behest of

17 the consumer and the consumer has no knowledge, then you're

18 acting independently on your own to put money in your own

19 pockets. And really I think that's what it comes down to, is

20 your conduct -- excuse me. That's where it comes down to,

21 notwithstanding being able to avail yourself of the promotion,

22 is your conduct, in fact, equitable?

23 THE WITNESS: Yes, sir, I understand that. The

24 question you asked though was not a yes or no question in the

25 sense that I believe you asked if we let the customer know if

FLORIDA PUBLIC SERVICE COMMISSION

94

1 we were going to apply for a credit. And the answer to that

2 question would be no because you don't tell the customer you're

3 going to apply for a credit. You're going to tell the

4 customer, "Sign up with us and you don't get a connection fee.

5 There's zero connection fee." And so in that sense the answer

6 is, yes, the customer is fully aware that they're not going to

7 be charged the connection, which is what the connection charge

8 waiver does. It waives the $40 connection fee. So we tell our

9 customers that there will not be a connection fee.

10 COMMISSIONER SKOP: Thank you. I think my colleague

11 has a question.

12 THE WITNESS: Yes, ma'am.

13 COMMISSIONER McMURRIAN: Commissioner Argenziano.

14 COMMISSIONER ARGENZIANO: Let me just try to say this

15 in a way that -- I have my personal opinion about end user. I

16 believe I'd like to see them reap the benefits. But then again

17 if you have a company that is taking people that other

18 companies won't, there may be reasons sometimes to -- the real

19 question, I think, and, Commissioner Skop, tell me, I don't

20 want to put words in your mouth, is are you making the customer

21 aware that they could get the end user benefit? I think that's

22 really the question here rather than saying is the company

23 saying do you know we get a benefit by you -- because if it's a

24 blocked call anyway, I don't think they're getting any benefit.

25 They're trying to, I think, but they're not. But I think the

FLORIDA PUBLIC SERVICE COMMISSION

95

1 real question would be is do you, do you make the customer, the

2 end user aware that they could be getting the benefit of the

3 features that the company is promoting? I think that's the way

4 I --

5 COMMISSIONER SKOP: And I think that's correct. I'm

6 struggling this morning to frame my questions.

7 THE WITNESS: I'm a little, a little confused. We

8 will let the customer know that there's no connection fee,

9 "Sign up today with no connection fee." But if you're asking

10 us if we tell the customer, "Hey, Mr. Customer, don't sign up

11 with us. If you go to BellSouth, you can" -- okay. We tell

12 the customer, we give the customer what promotion is available.

13 So, for example, the LCCW, Line Connection Charge Waiver, we

14 will tell the customer, "Sign up today for $24.99 and we'll

15 waive the connection fee." Because we -- it's not getting --

16 we're not getting charged by BellSouth because of the waiver

17 promotion, and they're paying it systematically and regularly

18 so we can expect to get paid and not be charged $40, and so

19 then we pass that through to the customer.

20 COMMISSIONER ARGENZIANO: And I don't want to belabor

21 the point and get -- but I think sometimes it helps to clarify,

22 and forgive me, I'll just make this last comment to see. I

23 think to try to articulate it a little better is that you're,

24 you're using the blocked, the blocking, whatever it's called,

25 as a feature that you are trying to get credit for. Are you

FLORIDA PUBLIC SERVICE COMMISSION

96

1 telling the consumer on that feature, not feature but blocking

2 that there's a credit for that? I think that's trying to

3 narrow it down, and then I'm going to leave it alone from

4 there.

5 THE WITNESS: Well, when you place an order -- when

6 BellSouth comes out with a promotion, so let's say they come

7 out with a Line Connection Charge Waiver, there's two things

8 you can do. You can call your BellSouth rep who will tell you,

9 go look in -- if you call the BellSouth rep and say, "How do

10 you qualify," they'll say, "Go look at the tariff." Or you can

11 go to the tariff yourself, which is what we do. So we have to

12 go to the tariff and see what the tariff says. For this

13 particular instance if you go to the tariff that was in effect

14 in early 2004, you will see that these, what we placed on our

15 orders are defined in BellSouth's own tariff, filed in the

16 State of Florida, they're defined as TouchStar features over

17 and over and over. They're footnoted and at the bottom, this

18 feature, da, da, da, da, da.

19 So when we looked at that, we said, "Hey, we ordered

20 this with this, this, this, this and this on every order. We

21 qualify." And so when BellSouth has paid other CLECs and we go

22 to the tariff and we go to the promotion and it all looks as

23 though we are doing everything aboveboard, then we apply for

24 it.

25 COMMISSIONER ARGENZIANO: Madam Chair. But doesn't

FLORIDA PUBLIC SERVICE COMMISSION

97

1 it also include the word "purchase"? If you don't purchase

2 blocking, then it's probably not --

3 THE WITNESS: Yes. And that was about number three

4 in the "yeah, buts" that BellSouth has come up with. And if

5 you look at the definition of purchase in any dictionary, you

6 can go to Black's Law, you can go to anywhere, in no way does

7 it say you have to purchase each individual item.

8 For example, when I was talking to the BellSouth rep,

9 I asked her, "Do you own a house?" She said, "Absolutely." I

10 said, "How much did the doorknob on your front door cost you?"

11 She said, "I have no idea." I said, "Well, then you didn't

12 purchase that doorknob." She said, "What do you mean?" I

13 said, "If you're telling me I have to purchase this and I have

14 to purchase this and I have to purchase this and you have to

15 itemize them on my bill or I didn't purchase them, then, then

16 when you bought your car, how much did your horn cost, because

17 it wasn't itemized on your car."

18 We placed an order with BellSouth for this package.

19 They sent us a bill for that package. Had they not, had they

20 not billed us at all, I believe that would be a valid argument,

21 but they billed us and we paid them. Therefore, in our mind we

22 purchased everything that we ordered.

23 COMMISSIONER McMURRIAN: I have one, I have one

24 question, too.

25 THE WITNESS: Yes, ma'am.

FLORIDA PUBLIC SERVICE COMMISSION

98

1 COMMISSIONER McMURRIAN: Mr. Bolinger, do you have

2 what Mr. Carver passed out with his opening statement, which

3 was that one page from the General Subscriber Service tariff?

4 THE WITNESS: I don't think so. I think I looked at

5 it when he initially passed it out.

6 COMMISSIONER McMURRIAN: Okay. Maybe somebody can

7 get you one.

8 MR. CARVER: Oh, I'll be happy to take a copy to him,

9 unless they --

10 COMMISSIONER McMURRIAN: Okay.

11 MR. CARVER: Apparently they have it.

12 MR. MALISH: Can I put it on the screen?

13 COMMISSIONER McMURRIAN: If that's okay for

14 Mr. Bolinger. As long as he's able to see it.

15 THE WITNESS: I think I can see it.

16 COMMISSIONER McMURRIAN: Okay. My question is --

17 because in some of your answers to Commissioner Argenziano you

18 talked about the TouchStar features and that's what the tariff

19 said, and I do see TouchStar in certain places on the sheet,

20 but the part that Mr. Carver highlighted here, it says "or

21 basic service and two features will be waived." So can you

22 explain to me -- you keep saying that it's two TouchStar

23 features. Is it somewhere else on this sheet that you're

24 referring to and then we're talking about two different

25 sections of the tariff or is it --

FLORIDA PUBLIC SERVICE COMMISSION

99

1 THE WITNESS: No, ma'am. I don't think.

2 COMMISSIONER McMURRIAN: -- that the tariff changed?

3 Can you explain?

4 THE WITNESS: I believe that it was a tariff change.

5 If you look at the date on that tariff, I believe it's December

6 of '04.

7 COMMISSIONER McMURRIAN: Uh-huh.

8 THE WITNESS: Our, our promotion, the Line Connection

9 Charge Waiver that we applied for we applied for in August of

10 '04 prior to that coming out in December. So what we were

11 operating under was a previous tariff. And I believe the

12 wording is very similar with one key exception, and the key

13 exception is basic service and two TouchStar features.

14 COMMISSIONER McMURRIAN: Okay. And so -- and my

15 follow-up question to that is is it your testimony that a

16 TouchStar feature includes Call Blocking?

17 THE WITNESS: Absolutely, as defined by BellSouth.

18 COMMISSIONER McMURRIAN: As defined. Okay. Where

19 did BellSouth define TouchStar feature as Call Blocking? Does

20 that take us back to the exhibit?

21 THE WITNESS: It's, it's all over. I mean, several

22 times, several times. And I could walk you through that, if

23 you'd like.

24 COMMISSIONER McMURRIAN: Is there something that you

25 can point to? Is Exhibit 27, the Web page, is that the basis

FLORIDA PUBLIC SERVICE COMMISSION

100

1 for your --

2 THE WITNESS: No. That, that we were looking for

3 TouchStar because there was some argument. They would say,

4 "Well, it's not TouchStar. It's not a TouchStar feature." And

5 so really the reason for that was they defined it as TouchStar.

6 That was not meant -- I believe the question, you

7 know, was is there a website somewhere where you can look at

8 it? And I said, yes, and we just had that example. But that

9 was not meant to be, as Mr. Carver was trying to point out,

10 feature related. It was just trying to be TouchStar related.

11 MR. MALISH: And, Commissioner McMurrian, if I may

12 interject. The stuff that you're probably looking for is

13 contained in Exhibit PAT-5.

14 COMMISSIONER McMURRIAN: Okay. So --

15 MR. MALISH: And I was going to go over that with

16 Ms. Tipton in her cross-examination.

17 COMMISSIONER McMURRIAN: And we can do that then.

18 MR. MALISH: It wasn't really part of his direct

19 testimony. But we can -- I can go over it with him or give him

20 the materials to go over with you, if you would like to do it

21 now.

22 COMMISSIONER McMURRIAN: That's quite all right. We

23 can wait until Ms. Tipton. I was thinking that that may be the

24 best way to approach it anyway. Thank you.

25 Mr. Carver, you can continue.

FLORIDA PUBLIC SERVICE COMMISSION

101

1 MR. CARVER: Yes. Thank you.

2 COMMISSIONER McMURRIAN: Thanks.

3 BY MR. CARVER:

4 Q I apologize. I'm having some allergy problems. So

5 if I have to stop and clear my throat from time to time, I

6 apologize.

7 I can't remember who asked the question, but in

8 response to one of the Commissioner's questions I think you

9 said that dPi does not charge its customers for line

10 connection; is that correct?

11 A I did not say that.

12 Q Okay. Well, that's what I wanted to clarify.

13 Because when AT&T charges dPi a line connection charge, dPi

14 passes that charge on to its customers, doesn't it?

15 A Absolutely. When we're charged, we have to pass it

16 through.

17 Q Okay. Let's talk, go back to blocks for a moment.

18 In the context of resale, AT&T does not charge dPi anything for

19 the BCR, the HGB or the BRD blocks; isn't that true?

20 A There is no line item charge. No.

21 Q And dPi doesn't charge its customers anything for

22 these blocks; correct?

23 A No.

24 Q No, you don't?

25 A No. No, we don't.

FLORIDA PUBLIC SERVICE COMMISSION

102

1 Q Okay. Thank you. That's all I have.

2 COMMISSIONER McMURRIAN: Ms. Tan.

3 MS. TAN: Staff does have some cross-examination

4 witnesses -- questions.

5 CROSS EXAMINATION

6 BY MS. TAN:

7 Q Mr. Bolinger, in September of 2004 you had Lost Key

8 Telecom on behalf of dPi submit a request for promotional

9 credits to AT&T for the Line Connection Charge Waiver; is that

10 correct?

11 A I believe that was the correct time. Yes, ma'am.

12 Q Okay. And did any of these requests for credits

13 submitted by Lost Key consist of only one purchase of -- of the

14 purchase of 1FR and feature Call Blocks?

15 A I'm not sure. I know there was -- on -- there has

16 been some discussion that at one point in time there was a

17 promotion out there that was basic service and one TouchStar

18 feature, so we may have put it in there. But we did not, you

19 know, intentionally put on anything that we didn't think we

20 qualified for.

21 Q Okay. And when did Lost Key on behalf of dPi submit

22 the majority of the requests for promotional credits? Do you

23 know the time frame?

24 A In -- with regard to this particular filing? Because

25 we do it every day today, so.

FLORIDA PUBLIC SERVICE COMMISSION

103

1 Q With regards to the issues presented in this filing.

2 A Yeah. I think it was -- we did -- the vast majority

3 was right about that time. August or September was the

4 majority of them for 2004.

5 Q Okay. And do you agree that when you are discussing

6 two features for free, it is a separate promotion from the Line

7 Connection Charge Waiver which activates a purchase, which

8 activates in this case with a purchase of a BellSouth basic

9 feature with at least two features?

10 A Yeah. And I may not have been clear. With the two

11 features for free there were some very specific requirements in

12 that promotion. For example, they -- BellSouth identified

13 exactly what you could choose. You had to choose -- there were

14 either three or four and you had to take two of those. And so

15 if you didn't have two of those on your bill, then you did not

16 qualify. It was extremely clear and very strict as to what you

17 could or could not order on that. With the line connection it

18 was just two TouchStar features.

19 Q Okay. And under discussion today is the Line

20 Connection Charge Waiver rather than the two features for free.

21 A Yes, ma'am.

22 MS. TAN: No further questions.

23 COMMISSIONER McMURRIAN: Thank you, Ms. Tan.

24 Anymore questions from the Commissioners before I

25 turn it to Mr. Malish for redirect?

FLORIDA PUBLIC SERVICE COMMISSION

104

1 Okay. Mr. Malish, any redirect?

2 MR. MALISH: Thank you. Thank you, Commissioner

3 McMurrian.

4 REDIRECT EXAMINATION

5 BY MR. MALISH:

6 Q Mr. Bolinger, I would like to visit with you about

7 your customer base in general for starters. Is it fair to say

8 that you have a large group of people who have difficulty

9 making their telephone bill payments?

10 A I would say, you know, in a nutshell traditionally

11 the answer would be yes.

12 Q Is that why they come to you in the first place?

13 MR. CARVER: Objection. This is beyond the scope of

14 the cross-examination. Redirect should be limited --

15 MR. MALISH: The relevance will be very clear in

16 short order.

17 MR. CARVER: It's not a relevant -- I'm sorry. I'm

18 not objecting on the relevance issue. I'm objecting that he's

19 gone outside the scope of the cross-examination and, therefore,

20 he's violating the Commission procedure.

21 MR. MALISH: This is going into some of the items

22 that Mr. Carver -- this is -- I'm laying a predicate for some

23 questions that clarify some of the things that Mr. Carver was

24 attempting to get Mr. Bolinger to say which have to do with how

25 customers order things from dPi.

FLORIDA PUBLIC SERVICE COMMISSION

105

1 COMMISSIONER McMURRIAN: I'll look to our legal

2 staff.

3 MS. CIBULA: Redirect is supposed to pertain to the

4 cross-examination. So if it is going outside of the

5 cross-examination, then it shouldn't be allowed.

6 MR. MALISH: I understand. But Mr. Carver in his

7 cross-examination --

8 COMMISSIONER McMURRIAN: Mr. Malish, perhaps it's

9 better just to make -- ask the question you want to ask, which

10 ties to the testimony, to the cross-examination that's occurred

11 before. I agree with Ms. Cibula that it should -- when I heard

12 the question, I'll say I was immediately thinking it was beyond

13 what we'd heard in cross-examination.

14 MR. MALISH: All right.

15 BY MR. MALISH:

16 Q Well, Mr. Bolinger, I want to revisit with you a

17 subject that Mr. Carver has raised, which is what dPi's

18 customers order from dPi. Okay? Are you with me?

19 A Yes.

20 Q Okay. You've got to answer with a yes or a no or

21 something besides a nod of the head.

22 Are they generally interested in, in having a fixed

23 price for what it is that they're buying from you?

24 A Yes. Our customers typically come to us and obtain

25 our service because they know from month to month for the most

FLORIDA PUBLIC SERVICE COMMISSION

106

1 part exactly what they're going -- their telephone bill will

2 be. It's easy to budget.

3 Q And is your basic package geared towards making sure

4 that the customer is guaranteed a specific price every month

5 for the telephone service they get?

6 A Yes.

7 Q And that's important to those customers?

8 A Absolutely.

9 Q All right. And do you, do you disclose to a customer

10 every single USOC that goes on to an order that you use to

11 provision a level of service that they select from you?

12 A I don't think any company could or would. There's

13 just a litany of different things that you have to put on every

14 order.

15 Q Right. So I think I'm going to go up to you and

16 order basic service. When you go place an order for that, it's

17 more than checking off a single box, isn't it?

18 A Absolutely. It's four or five pages.

19 Q Yeah. And you don't tell the customer, "I have to

20 check off 50 boxes in these four or five pages," do you?

21 A No.

22 Q Okay. All of the various components that go into

23 making that order come true for that customer, they don't know

24 the specific technical details; correct?

25 A Not unless they're extremely informed on

FLORIDA PUBLIC SERVICE COMMISSION

107

1 telecommunications.

2 Q All they know is they want a specific price

3 guaranteed per month; isn't that true?

4 A Yes.

5 Q And in order to make sure they get what they ask for,

6 is it necessary for you to put those blocks on the line?

7 A Yes. Because those blocks inhibit per charge or per

8 action charges that would be, would be billed on that account.

9 Q Okay. So, for example, if some -- if a woman with

10 children comes to you and orders service and those blocks

11 aren't on there, could their children, could her children use

12 her telephone to run up a bunch of charges that she doesn't

13 want to pay?

14 A No. In fact, that's why a lot of customers come to

15 us for that exact reason.

16 Q Okay. I'm saying without the blocks on there.

17 A Oh, without the blocks on there, could -- absolutely.

18 Q So if she wants to guarantee that she gets that one

19 fixed price month after month, it is necessary for you in order

20 to be able to guarantee that to her to put the blocks on there;

21 correct?

22 A Yes.

23 Q Now you have other offerings that allow access to

24 those features; correct?

25 A We do.

FLORIDA PUBLIC SERVICE COMMISSION

108

1 Q You know, the other features, Call Waiting and all

2 the other more extravagant features; right?

3 A Yes. We have a package where I think you can, you

4 get up to six or seven different features as BellSouth is

5 referring to.

6 Q And so the customer has the choice. They can choose

7 basic guaranteed fixed price service for just the basics;

8 correct?

9 A Right.

10 Q Or they can order something with more access to more

11 extravagant features if that's what they want.

12 A Yes. We have three basic packages.

13 Q Okay.

14 A Kind of a, you know, basic, basic package, a middle

15 of the road package, which typically will have Call Waiting and

16 Caller ID on it. But, again, even with Call Waiting and Caller

17 ID we've got to put the USOCs on there to block all of, you

18 know, Call Returns, Three-Way Calling, everything else, just

19 like any phone company would. And then we have a premiere or

20 gold or the top package which has everything. And customers

21 can also, if they don't want any of those packages, can buy

22 basic service and then items a la carte.

23 Q Okay. But in order for you to oblige their direction

24 to you, "I want basic service only and no other charges with a

25 fixed price every month," in order to honor that commitment to

FLORIDA PUBLIC SERVICE COMMISSION

109

1 them, you generate an order and that order includes the blocks;

2 is that correct?

3 A Yes.

4 MR. CARVER: If you're giving the witness a document,

5 could I see a copy of it?

6 MR. MALISH: I'm going to put it on the overhead.

7 MR. CARVER: Okay. Thank you.

8 BY MR. MALISH:

9 Q Mr. Bolinger, that's a page out of the tariff that's

10 marked as plaintiff's exhibit or, excuse me, PAT, Exhibit

11 PAT-2, Page 1 of 6; correct?

12 A Yes.

13 Q That's a page out of the tariff talking about

14 features and the charge waived there; right?

15 A It's a section that talks about what charges are

16 waived. And I haven't seen the whole thing, so it's waived if

17 you order something.

18 Q It just says features but it doesn't say TouchStar;

19 right?

20 A Right. That is correct.

21 Q And here's 27, which says TouchStar but no features.

22 A That is correct.

23 Q That's what Mr. Carver got you to admit, it says no

24 features; right?

25 A Right.

FLORIDA PUBLIC SERVICE COMMISSION

110

1 Q But -- and, by the way, why are there only Bs on that

2 page?

3 A I believe when you do that lookup, there's an

4 alphabet up top and you can click A, B, C, D. And so because

5 BCR and BRD both begin with B, it could be those are the ones

6 that popped up.

7 Q And it's your contention that these are TouchStar

8 features?

9 A It's my contention that, yes, those are absolutely

10 TouchStar features as defined by AT&T.

11 Q Okay. I'm going to show you what's been admitted as

12 Exhibit PAT-5. This is Page 1 of 15. This at the beginning of

13 TouchStar service. Have you seen that before?

14 A Yes.

15 Q What is TouchStar service?

16 A It's a group of central office call sequences. And I

17 can't read the rest of it, but --

18 Q Does that say "TouchStar service is a group of

19 central office call management features offered in addition to

20 basic telephone service"?

21 A I think so. I can't read it. It's too small. I'm

22 sorry.

23 Q Give me another copy. Do you have one? If I zoom

24 in, does this help you?

25 A Tremendously. Yeah. TouchStar service is a group of

FLORIDA PUBLIC SERVICE COMMISSION

111

1 central office call management features. Yes.

2 Q All right. And then it goes on to say, "TouchStar

3 service consists of the following features," and then the rest

4 of the tariff is going to describe those; correct?

5 A That is correct.

6 Q So TouchStar is features; correct?

7 A Absolutely.

8 Q It's call management features; right?

9 A Yes. And, you know, I believe that's why the 2004

10 tariff that Mr. Carver passed out eliminated the TouchStar

11 features and just put in their features.

12 Q Because it's understood that that's what they are?

13 A Yeah. When you put TouchStar in there, you're

14 talking about features.

15 COMMISSIONER McMURRIAN: Mr. Malish, I'm going to let

16 Commissioner Skop jump in with a question while we're on that

17 point.

18 COMMISSIONER SKOP: I just have a question for the

19 witness because I've been following along in that same section

20 and, again, this is a very thin line on many different regards.

21 And I do appreciate, you know, business looking to exploit

22 ambiguity, if you will.

23 On that same exhibit, Page 2 of 15, where it

24 discussed the Call Return feature at the very bottom of

25 Paragraph A, it states, "Access to the usage option can be

FLORIDA PUBLIC SERVICE COMMISSION

112

1 restricted at the customer's request at no charge." I think

2 that's the blocking part of that, and I just wanted to get you

3 to elaborate a little bit. It's highlighted there. Again,

4 because I'm trying to compare and contrast and work through the

5 ambiguous nature of the language that probably could be a

6 little bit more tighter, exclude certain things. But I see

7 Page 1 of 15, I see Page 2 of 15, and then going back to the

8 charges on Page -- which option is that? Call Return -- bear

9 with me for one second. Call Return on Page 12 of 15 where it

10 shows the -- maybe it's -- no. Call Return on Page 11 of 15 it

11 shows actually the monthly rate. And I know there's been some

12 discussion about, you know, the charges or the purchases

13 analogy that the witness made, which was, you know, an equally

14 valid analogy.

15 I'm just trying to flesh this out because I do think

16 that there is -- it dwells on small details and these very

17 details are the ones that either make or break your case. I'm

18 trying to make sure that I understand completely because I do

19 see, you know, what -- there's two sides to every story and

20 certainly it's, we're arguing over words. But if you could

21 flesh that out, I'd appreciate it.

22 THE WITNESS: Sure. I think there are -- I think, I

23 think you're right. I mean, you know, the first, the first

24 issue is, you know, are BCR and BRD TouchStar features? And I

25 think by looking at BellSouth's own tariff there's absolutely,

FLORIDA PUBLIC SERVICE COMMISSION

113

1 positively no question that they are TouchStar features.

2 And then the second issue is, did BellSouth offer it

3 to its own customers? Again, I don't think it's unquestioned

4 that or I don't think you can have any question that they did

5 not offer or that they offered it to their own customers

6 exactly the way we ordered it.

7 If you are -- I'm going to try to do this as quickly

8 as possible. I think the easiest --

9 MR. MALISH: I think maybe I can help.

10 COMMISSIONER SKOP: Actually let me just interject in

11 there to -- again, not to consume too much time, but I think

12 I'll limit my question to this.

13 On Page 2 of 15 it defines the feature, which the

14 feature is Call Return, and I'm interested in how the block is

15 actually the feature. So I think that -- it seems like you

16 have to imply that the block is inherent within the feature

17 itself. But, I mean, clearly the feature on Page 2 of 15 is

18 the Call Return, and that's the feature offerings. And it

19 seems like the, the block is basically an election to either

20 enable or disable that feature. So that's what I'd like you to

21 flesh out for me, please.

22 THE WITNESS: Sure. I think the easiest way to do

23 that would be to turn to Page 12 of 15, at least the quickest.

24 MR. MALISH: Hold on. Let me, let me -- I've got all

25 that.

FLORIDA PUBLIC SERVICE COMMISSION

114

1 THE WITNESS: And if you look at Call Return there

2 under (1)(C), denial of per activation, do you see that line

3 there? Where the USOC is BCR --

4 COMMISSIONER SKOP: Yes, I see that.

5 THE WITNESS: And the footnote on there is a one.

6 The footnote under one, and it says "Note 1: These features

7 are available to the following types of service where

8 facilities permit: Single line residence, multi-line

9 residence, and PBX trunks." So BellSouth right there is saying

10 BCR is a feature. Again, if you look down at -- where is the

11 other one -- HBG under Call Tracing, (6), Call Tracing, (6)(c),

12 denial of per activation, HBG, Footnote 1, "These features are

13 available."

14 COMMISSIONER SKOP: Okay. I think you answered my

15 question. I just have one quick follow-up.

16 THE WITNESS: Sure.

17 COMMISSIONER SKOP: With respect to the tariff before

18 us, and noting the points that you've alleged, if the tariff

19 were -- if the tariff were subsequently amended to tighten up

20 the language, would you still have your argument other than

21 based on prior conduct? If the tariff changed, would you still

22 be eligible in your mind for --

23 THE WITNESS: Depending on what the tariff is, maybe

24 or maybe not. They -- and really one of two things could

25 change, the tariff or the promotion. What has occurred since

FLORIDA PUBLIC SERVICE COMMISSION

115

1 this started in 2004 is that, that the promotions that are

2 coming out now are very specific, very well-written, just like,

3 you know, we talked about the two features for free where they

4 said you have to have X, Y or Z or you don't qualify. They

5 are, they are doing that now. And currently, you know, for the

6 promotions that we apply for, we get the vast majority of them

7 back. We get them credited to us.

8 COMMISSIONER SKOP: And just finally one, one

9 follow-up question, and I don't know if you have knowledge of

10 this. And if you don't, just tell me. But on the exhibit that

11 we, that we had that was on the overhead previously, the PAT-2,

12 the second page of that exhibit where the footnote in question

13 was, do we know when that footnote was in place? Was that

14 footnote in place or was it recently revised to include that

15 footnote?

16 THE WITNESS: I couldn't tell you when that footnote

17 was put, you know, on that document.

18 COMMISSIONER SKOP: Okay. Thank you.

19 THE WITNESS: Thank you.

20 COMMISSIONER SKOP: Actually let me just jump in one

21 more time. Just in general, I respect the fact that, again,

22 what you guys are trying to do. I don't necessarily know if I

23 like it or not, but I do respect -- I see what you're trying to

24 do.

25 THE WITNESS: Thank you. Thank you.

FLORIDA PUBLIC SERVICE COMMISSION

116

1 COMMISSIONER SKOP: So it just -- I think it boils

2 down to the interpretation of the language and then, you know,

3 equitable principles. But I'm just trying to follow along and

4 basically understand what I see to be happening before us, so.

5 THE WITNESS: And if I could, if I could comment.

6 COMMISSIONER SKOP: Briefly.

7 THE WITNESS: Just brief. You know, all we are

8 trying to do, and I think we will prove this today, is if

9 BellSouth gives it to their customers, we want to at least have

10 the opportunity to give it to ours. That's all we're asking.

11 COMMISSIONER SKOP: But would you agree they're

12 giving it to their customers in a completely different context

13 than you are? You guys are looking at the, at the blocking as

14 qualification. And I think that under BellSouth's context they

15 would expect the customer to pay for the actual featured

16 service, the one that they get the money for.

17 THE WITNESS: I would absolutely disagree with that,

18 as the thousand pages will show.

19 COMMISSIONER SKOP: Okay. Thank you.

20 COMMISSIONER McMURRIAN: Mr. Malish.

21 BY MR. MALISH:

22 Q At the expense of retracing some ground here. So,

23 Mr. Bolinger, under the tariff we see here that the BCR and BRD

24 and HBG are listed there as a feature; correct?

25 A Yes.

FLORIDA PUBLIC SERVICE COMMISSION

117

1 Q Now are these devices, are these devices that are

2 used to manage the calls to the particular end user's telephone

3 number, are they call management features?

4 A Incoming call management features?

5 Q Yes.

6 A Not, not incoming.

7 Q Does this, does this allow the end user to manage the

8 calls that he or she gets or gets to make?

9 A No. No. She can -- the customer can receive as many

10 calls or make as many calls as they want with our service.

11 Q Well, but these -- if you put this BCR or BRD or HBG,

12 that manages the kinds of calls that can be made by that

13 customer.

14 A Yes.

15 MR. CARVER: I'm going to object. His witness has

16 answered. Now he's cross-examining his own witness.

17 THE WITNESS: I misunderstood the question.

18 MR. MALISH: That's not illegal. That's not grounds

19 for an objection.

20 BY MR. MALISH:

21 Q So, so the BRD, the HBG and the BCR --

22 COMMISSIONER McMURRIAN: Mr. Malish, hold on just a

23 second. Staff? I mean, we had an objection and he responded

24 and I didn't really rule on anything, so I'm just looking for

25 your input.

FLORIDA PUBLIC SERVICE COMMISSION

118

1 MS. CIBULA: Well, I guess it's up to you to let --

2 whether you want to let him clarify the question or --

3 MR. CARVER: And my objection, if I may, is just that

4 he's treating his witness as if he is adverse and he's asking

5 him leading questions.

6 COMMISSIONER McMURRIAN: I will -- I did hear,

7 Mr. Malish, hear the answer to his witness's question and say,

8 "but," and then went on with another question. So it sounded a

9 little bit like that to me, too, but I --

10 MR. MALISH: Sure. But you --

11 COMMISSIONER McMURRIAN: Why don't we just issue a

12 caution and you be careful about how you proceed.

13 MR. MALISH: I understand. But obviously at this

14 point we've been through direct and cross and questions from

15 you, so I need to give tailored, very carefully, narrowly

16 tailored follow-up questions to clarify things that may still

17 be confusing.

18 COMMISSIONER McMURRIAN: And hold on just a second,

19 too.

20 Commissioner Argenziano, did you --

21 COMMISSIONER ARGENZIANO: I just took it as it was

22 clarifying. I think he had not made it clear what his real,

23 real question was.

24 MR. MALISH: Thank you.

25 COMMISSIONER McMURRIAN: You can proceed.

FLORIDA PUBLIC SERVICE COMMISSION

119

1 MR. MALISH: I do that, I do that all too frequently.

2 BY MR. MALISH:

3 Q So these blocking features are call management

4 features?

5 A Yes. To a certain extent, yes.

6 Q Okay. Now, and is it correct to say that they are

7 defined here in the TouchStar features section of the tariff?

8 A Yes.

9 Q Okay. Have you seen Page 4 of 15 of Ms. Tipton's

10 testimony, which is Section A13.19 of the tariff, which is some

11 more features itemized?

12 A Yes.

13 Q And that's showing that Call Block is a TouchStar

14 feature, isn't it?

15 A Yes.

16 Q And down here under (f), Call Tracing is a feature.

17 And then subject to the availability of the facilities, access

18 can be restricted at no charge. That's the -- is that the HBG

19 block?

20 A Yes.

21 Q So the fact that something is a block does not mean

22 it cannot be a feature?

23 A No. For example, if you look at Call Block there, in

24 E the last sentence says, "Additionally, this feature will not

25 block calls from coin or cellular telephones or operator

FLORIDA PUBLIC SERVICE COMMISSION

120

1 assisted calls."

2 Q So it's referring to Call Block as a feature. And,

3 of course, it's listed as an E, one of the main ones; correct?

4 A Yes. Without the feature on there it is a per use

5 charge. If you put a feature on there, the feature either

6 turns it all the way on or the feature will turn it all the way

7 off. Either way it is still putting a feature on the, on the

8 line.

9 Q Here's another section from, another section from the

10 tariff. Can you read that?

11 A Yes. It says, "Calling number delivery blocking."

12 Is it permanent? It's sort of small.

13 Q Permanent.

14 A And then "Calling number delivery blocking per call."

15 Q And that's another TouchStar feature listed under the

16 list of TouchStar features specifically available under the

17 tariff, isn't it?

18 A Yes. Those are two blocks that you use with

19 TouchStar features.

20 COMMISSIONER McMURRIAN: Hang on a second, Mr.

21 Malish.

22 Commissioner Skop.

23 COMMISSIONER SKOP: Yes. Just one more question.

24 Again, on Page 2 of 15, I guess we're focusing on the

25 access to the usage option can be restricted at the customer's

FLORIDA PUBLIC SERVICE COMMISSION

121

1 request at no charge. I think previously in your testimony you

2 indicated when you give your offerings to customers, that there

3 are certain options, I think you stated the gold option, that

4 allowed the consumers to make an express informed choice to add

5 features at additional cost. Is that correct?

6 THE WITNESS: Yes. Unlimited features. Yes.

7 COMMISSIONER SKOP: Okay. And so the corollary of

8 that I think that you guys are implying, and this is where I'm

9 trying to tie this to the language, is that when they elect the

10 fixed price option, that that implies that they are requesting

11 that these features be blocked so they can't utilize them.

12 Because, again, the language of the tariff says "restricted at

13 the customer's request," but it's almost implied that they're

14 requesting it, or I think that's what you guys -- I mean, I

15 don't see express customer request here.

16 THE WITNESS: I don't think any telephone company

17 could say that for all their customers who order basic service

18 they have express customer requests to, to not allow Call

19 Return or to not allow Caller ID. It's just the customer

20 ordered just a basic line, just what's referred to as a POTS

21 line, plain old telephone service.

22 COMMISSIONER SKOP: Okay. I'm -- again, I'm just

23 trying to put that in perspective. With your business model,

24 again, you focus on people that have been denied service in the

25 past, so obviously they're very price conscious; whereas, you

FLORIDA PUBLIC SERVICE COMMISSION

122

1 know, with AT&T, if I were going directly to a customer, I

2 might ask them, "Okay, well, here's the implication. Do you

3 want this feature, do you want it?" It might be more customer

4 service oriented; whereas, yours is just a feature that's on a

5 fixed price, a firm fixed price.

6 Again, I'm just, I'm trying to distinguish the words

7 because, again, the tariff does say "at the customer's

8 request." But it's not, in your case, in your business model

9 it's not a formal request. It's just kind of implicit that in

10 order to keep the fixed price you have to do certain things.

11 THE WITNESS: Well, I would say that we are no

12 different than AT&T in that we try and upsell customers to

13 bigger packages and things of that nature because obviously the

14 revenue is greater, as AT&T does. However, our typical

15 customer doesn't have the, usually the, you know, the necessary

16 funds to pay for, for that upsell. And so they say, "No, I

17 just want basic service."

18 And I would also tend to believe that if, if I were

19 to call AT&T today and say "I just want basic service and basic

20 service only," they're not going to tell me all of the blocks

21 and everything they're putting on my account. It's just if I

22 order basic service, I am implicitly saying I don't want

23 anything else other than basic service, which is our basic plan

24 which 85 percent of our customers take. And if they say, if we

25 say, you know, "We will give you basic service" and they say,

FLORIDA PUBLIC SERVICE COMMISSION

123

1 "What is that", we will absolutely tell them, "We put basic

2 service on your account. We block all usage charges outside so

3 you know exactly what your bill is going to be every month."

4 But if they call us and just say, "I want basic service," we

5 don't have a policy to sit there and tell them exactly what's

6 on their bill. No.

7 COMMISSIONER SKOP: I'll defer to Commissioner

8 Argenziano. I think she --

9 COMMISSIONER McMURRIAN: Go ahead, Commissioner

10 Argenziano.

11 COMMISSIONER ARGENZIANO: Madam Chair, a question of

12 Commissioner Skop.

13 COMMISSIONER McMURRIAN: Sure.

14 COMMISSIONER ARGENZIANO: You were just referring to

15 which tariff, the one of 2003 or 2006? And can you show me

16 where it says the "at the customer's request," because I think

17 I lost it?

18 COMMISSIONER SKOP: I think it was at Tab PAT-5.

19 COMMISSIONER ARGENZIANO: All right.

20 COMMISSIONER SKOP: On Page 2 of 15.

21 COMMISSIONER ARGENZIANO: 2 of 15. Okay. So that's

22 the two thousand and --

23 COMMISSIONER SKOP: 1996 tariff.

24 COMMISSIONER ARGENZIANO: 1996?

25 COMMISSIONER SKOP: Yes, ma'am.

FLORIDA PUBLIC SERVICE COMMISSION

124

1 COMMISSIONER ARGENZIANO: Okay. My question, I

2 guess, is didn't it keep changing?

3 COMMISSIONER SKOP: It may have. I mean, that's part

4 of the problem I'm facing here is what, what has changed, what

5 has evolved, because I think it's --

6 COMMISSIONER ARGENZIANO: Right. And I guess, Madam

7 Chair, for staff to be contemplating at the proper time is

8 since the tariff keeps changing or the promotion keeps changing

9 or both do, at what point is the company, you know, I mean, if

10 I'm operating under the 2004 tariff that included TouchStar

11 features, then I would be reasonably expected to, for that

12 period of time until there was another tariff change or

13 promotional change to be in that plan.

14 And what I'm seeing is that there are several

15 different plans, and I need to figure out -- because I'll be

16 honest with you, and I'll give you time, I just, and I lost it

17 on the screen, but I just pulled up another website of AT&T

18 which did include features as Call Blocking and had a charge

19 for it and then no charge under promotional plans. I think

20 it's the Complete --

21 THE WITNESS: Complete Choice?

22 COMMISSIONER ARGENZIANO: Complete Choice, and under

23 that it showed. So I'm thinking -- for staff, I guess, under

24 the 2004, if I were dPi and that language was on there that

25 said TouchStar features, well, then maybe there's a reasonable

FLORIDA PUBLIC SERVICE COMMISSION

125

1 expectation of being eligible for that promotion at that time.

2 And in the 2004 I don't see where it says the customer has to

3 request it. So those things all have to fall in place for

4 each, to me for each kind of contract or tariff or promotion to

5 understand where this company may be entitled and where they

6 may not, and that's what I need from staff.

7 COMMISSIONER SKOP: Absolutely. I would echo that.

8 Because, again, it's a sliding scale and we're dealing with,

9 we're dwelling on small details. And each, each tariff needs

10 to be explicitly analyzed in relation to whether there is any

11 merit for a request for adjustment that could be, you know,

12 advocated. I don't know what the answer is, but the analysis

13 needs to be detailed and, you know, reflect each individual

14 tariff in relation to the claims alleged.

15 MS. TAN: Those are very important concerns and that

16 is something that staff will touch upon in our recommendation

17 to the Commissioners in the posthearing, at the posthearing

18 recommendation.

19 COMMISSIONER McMURRIAN: And just to add, I think

20 another idea, maybe when Witness Tipton comes to the stand we

21 can ask her questions about their tariff filing that's attached

22 to her testimony too and have her explain the date changes and

23 how the tariffs were revised over time.

24 MR. CARVER: Yes. I think she can address those.

25 COMMISSIONER McMURRIAN: Okay. Thank you.

FLORIDA PUBLIC SERVICE COMMISSION

126

1 Mr. Malish.

2 BY MR. MALISH:

3 Q I'll continue going through the TouchStar features or

4 TouchStar service tariff. And, Mr. Bolinger, I'd like to again

5 be looking at A13.19 again, which is TouchStar service

6 continued, and direct your attention to Item 13 at the bottom.

7 We're talking about the various things you can get under

8 TouchStar service. The blocks that we've been talking about,

9 are those ones that are listed under denial of per activation

10 Call Return and denial per activation of Repeat Dialing?

11 A Yes. That would be, you know, the BCR and BRD USOCs.

12 Q And those are mentioned in the TouchStar tariff again

13 on this page.

14 A Yes.

15 Q All right. This is the page that we talked about

16 with the pricing for the BRD, the BCR and the HBG, and they're

17 showing there's no charge for those; right?

18 A Correct.

19 Q Do you remember the other blocks that we talked about

20 that we saw in the tariff?

21 A Yes.

22 Q Do you see the pricing for those? Again, we're

23 looking at the TouchStar service tariff A13.19.

24 A Yes. The calling number delivery blocking permanent

25 and the calling number delivery blocking on a per call basis.

FLORIDA PUBLIC SERVICE COMMISSION

127

1 Q Okay. It's the continuation, it's the next page.

2 It's page 13 of 15 of PAT-5.

3 A Yes.

4 Q Look -- so those are those other blocks that were

5 specifically listed as features. And what's the rate for

6 these?

7 A There's no charge for those feature blocks either.

8 Q Okay. So there's no charge for those features.

9 COMMISSIONER McMURRIAN: Hang on, Mr. Malish.

10 Commissioner Skop.

11 COMMISSIONER SKOP: Yeah. Just one question, I

12 guess. The tariff that we're referring to is in the time frame

13 of the late 1990s, and I'm kind of wondering how, how is that

14 relevant in relation to the time frame of your claims that you

15 may have for the promotions?

16 MR. MALISH: The way that the tariffs work is that

17 they're submitted, you know, they're submitted.

18 COMMISSIONER McMURRIAN: Mr. Malish, I think we need

19 to let the witness answer that question.

20 MR. MALISH: I doubt if he knows, but all right.

21 COMMISSIONER SKOP: I'll withdraw my question. But I

22 guess my concern is if we're dealing with a tariff that's --

23 because I see one here that's for 2004, and I think

24 Commissioner Argenziano raised that question. So I'm trying to

25 find temporally where we are at in this, you know, this --

FLORIDA PUBLIC SERVICE COMMISSION

128

1 THE WITNESS: And I'll try to answer. I think, I

2 think that for a long period of time the tariff was pretty

3 stagnant and you'd just go to the tariff and, and you'd look at

4 it. Since the advent of, you know, the Internet where they can

5 put it up on a website and a lot of different law changes that

6 have occurred, tariffs have become more frequently changed in

7 the last few years than they were. But that's just my, my

8 opinion.

9 COMMISSIONER SKOP: Let me cut you off there. Did

10 your claims arise prior to 2004?

11 THE WITNESS: No. Our claims arise beginning January

12 of 2004, I believe, and go through, you know, whatever we were

13 denied up through 2005.

14 COMMISSIONER SKOP: Okay. So you stated that your

15 claims arose beginning in January 2004; is that correct?

16 THE WITNESS: I believe that is correct. Yes.

17 COMMISSIONER SKOP: Okay. Thank you.

18 BY MR. MALISH:

19 Q Mr. Bolinger, y'all have tariffs just like AT&T;

20 correct?

21 A Yes, we have to file tariffs.

22 Q And they're, whatever, 100 pages long; correct?

23 A Yes.

24 Q And when you have a change that you want to make to a

25 portion of a tariff, do you replace the whole tariff?

FLORIDA PUBLIC SERVICE COMMISSION

129

1 A No. You just amend the current tariff on file.

2 Q And so what do you do, you submit a new page?

3 A Yes. Or pages. Yes.

4 Q And does each page say at the top of it this is

5 amended such and such a date?

6 A Yes.

7 Q So when you go online to look at dPi's tariff, is it

8 going to have, let's say, 100 pages, but each one of those

9 pages may have a different effective date?

10 A Several, several pages would.

11 Q Right.

12 COMMISSIONER McMURRIAN: Commissioner Skop.

13 COMMISSIONER SKOP: Thank you, Madam Chair. Just one

14 other follow-up question, too.

15 Do you guys have a -- because I have not come across

16 it in my materials, but in the summary of the testimony you've

17 mentioned that thousands of dollars are owed and other

18 promotions are owed. Do you guys have a compilation list of

19 what you're alleging by year or month that --

20 THE WITNESS: We can give it to you by month, by

21 telephone number.

22 COMMISSIONER SKOP: Okay. Staff, would -- or Madam

23 Chair, would that be --

24 COMMISSIONER McMURRIAN: Let me follow up.

25 Mr. Bolinger, is it in the testimony or the exhibits

FLORIDA PUBLIC SERVICE COMMISSION

130

1 that are part of the case already, I think was his question?

2 THE WITNESS: Okay. I just thought he was asking if

3 it was available. I know we, we -- dPi has provided it to our

4 attorneys. I couldn't tell you, you know, what exhibits are in

5 and what aren't. So I don't know the answer to that one.

6 MR. MALISH: Commissioner Skop, I'm not sure if

7 you're asking -- in this case right here we've only provided

8 numbers for the LCCW, I think. If you are asking about the

9 other ones --

10 COMMISSIONER SKOP: No. I'm only, only strictly

11 limited to this docket. That's the only thing I was wanting to

12 look at. Because, again, I'm trying to figure out

13 temporally -- I know the explanation of tariffs, that you don't

14 amend every page every time you do an amendment. It's a page

15 by page with an effective date and I'm okay with that. I'm

16 just trying to, again, get all the pieces in front of me so I

17 can kind of, you know, kind of form my opinion based on the

18 evidence that I'm hearing as to, you know, what I'll ultimately

19 think about the evidence. Thank you.

20 COMMISSIONER McMURRIAN: Perhaps after the lunch

21 break perhaps we can revisit whether or not that's in the

22 testimony somewhere and just revisit that question and see if

23 there's some way to get that question answered.

24 THE WITNESS: And, ma'am, you have to understand that

25 it's an ever changing number because each month you're filing

FLORIDA PUBLIC SERVICE COMMISSION

131

1 promotions and some of them are getting credited, some of them

2 are getting denied. We're appealing why they denied it. And

3 so in Florida every month that number changes.

4 COMMISSIONER McMURRIAN: I understand that. I think

5 though, Mr. Bolinger, we would be interested in the number that

6 would be at issue in this case, not the number changing after

7 that.

8 THE WITNESS: Correct. I think, I think at the time

9 we filed the number was something -- in Florida specifically I

10 think it was somewhere in the neighborhood of $77,000.

11 MS. TAN: Commissioner, that is dPi Florida 4.

12 COMMISSIONER McMURRIAN: Thank you. DPi-4. It's the

13 exhibit number dPi FL-4.

14 MS. TAN: It would be Exhibit Number 20.

15 MR. MALISH: I'm sorry. The number should be in

16 dPi-4. I keep turning this on and off the wrong way.

17 COMMISSIONER McMURRIAN: Commissioner Skop, do you

18 want the witness to look at dPi-4 and perhaps ask questions

19 with respect to that or do you want to just look at it later

20 and --

21 COMMISSIONER SKOP: Look at it later.

22 COMMISSIONER McMURRIAN: Okay. Mr. Malish, you can

23 continue with your redirect.

24 BY MR. MALISH:

25 Q There is, there is one thing that I'm, I'm not sure

FLORIDA PUBLIC SERVICE COMMISSION

132

1 we need clarification on, so I'm going to try to clarify it

2 just to be on the safe side because I'm afraid that there might

3 be some confusion between the two features for free promotion

4 and the LCCW promotion where AT&T is complaining that we don't

5 qualify because they're saying the features that we take are

6 free and not at additional cost. So I'm afraid that those have

7 gotten mixed together, and I'm going to ask some pointed

8 questions on those.

9 A Okay.

10 Q Are those two different promotions?

11 A Absolutely.

12 Q All right. And I think you said earlier that the,

13 the, what is it, the two features for free promotion has a

14 specific kind of, of features that you have to, you have to

15 take and they're specifically identified.

16 A Yes.

17 Q And that's different from the LCCW promotion that

18 we're talking about here which just leaves it open to any

19 feature; correct?

20 A Any TouchStar feature, yes.

21 Q All right.

22 A So you need two TouchStar features.

23 Q Okay. And there is no overlap between the, those two

24 promotions; correct?

25 A There is in a sense.

FLORIDA PUBLIC SERVICE COMMISSION

133

1 Q Okay. You cannot qualify for both of those

2 promotions in the same --

3 A No, you could not double dip. But you could have one

4 order that qualified for more than one promotion, but you have

5 to pick and choose which promotion you're going to apply for.

6 You cannot apply for them both.

7 Q Okay. And there's another thing that we need to

8 clarify. DPi has -- is complaining that it has not been

9 credited for promotions that it sought under the, promotional

10 credits that it sought under the LCCW promotion in situations

11 where it was passing orders that consisted of basic service,

12 which is 1FR; correct?

13 A Correct.

14 Q Plus two of the following three blocks: HBG, BCR or

15 BRD; correct?

16 A That is correct.

17 Q That's how the orders were configured by dPi which it

18 was seeking to get credit from, from AT&T; is that correct?

19 A Yes. Those are all part of the order. The orders

20 are very long, but those are all part of the order.

21 Q And did AT&T retail customers submit orders to AT&T

22 which consisted, just like dPi's, of 1FR, that is basic

23 service, plus two or more of the, of the BCR, BRD or HBG

24 features and none others?

25 A Yes.

FLORIDA PUBLIC SERVICE COMMISSION

134

1 MR. CARVER: Objection. Now what he's doing -- this

2 is nowhere in his testimony at all. What he's now trying to do

3 is to get the witness to say on the stand what is in the

4 testimony that the Commission has said that he could not

5 prefile. This was in the supplemental testimony of Mr.

6 Bolinger. The Commission did not allow that filing, and now

7 he's trying to get it in.

8 MR. MALISH: Commissioner McMurrian, this is

9 precisely what Commissioner Argenziano was asking Mr. Bolinger

10 to answer for her, and I need to make sure that the record is

11 clear what the situation is here.

12 COMMISSIONER McMURRIAN: Can you, can you restate the

13 question for me? I was actually busy trying to check on -- in

14 fact, we need to also check the status of where we are because

15 I think we're going to need to take a break. I think the court

16 reporter really needs one and probably us, too.

17 MR. MALISH: All right.

18 COMMISSIONER McMURRIAN: Anyway, can you restate your

19 question for me? We'll deal with this and then maybe we'll

20 talk about taking a break early.

21 MR. MALISH: The, the question is comparing the kinds

22 of orders from AT&T retail users to AT&T corporate with the

23 kinds of orders that were sent by dPi to AT&T corporate. And

24 we're establishing that -- Mr. Bolinger has said that the

25 orders that dPi sends in are configured with 1FR, BCR, BRD and

FLORIDA PUBLIC SERVICE COMMISSION

135

1 HBG and no other features. And the question was earlier from

2 Commissioner Argenziano, are those the same as the ones that

3 were being submitted by AT&T's retail customers to AT&T? And I

4 need to make sure that this is clear for the record whether

5 that happened or not because that's, I think, what Commissioner

6 Argenziano wanted to know. Because that's -- we've got to

7 compare apples to apples. Are the orders from AT&T retail

8 customers the same as the orders from dPi to AT&T?

9 COMMISSIONER McMURRIAN: Mr. Carver.

10 MR. CARVER: And my objection is this: If you look

11 at the testimony that was prefiled according to the rules of

12 the Commission, there was absolutely nothing by Mr. Bolinger on

13 that point. They tried to supplement on the eve of hearing and

14 they were denied.

15 Now if Mr. Malish wants to get into this, he has a

16 discovery exhibit and he can cross-examine Ms. Tipton and he

17 can ask questions about it. Because, you know, obviously they

18 think this exhibit means something, we think it means nothing,

19 and we don't think it shows what they claim it shows. And he

20 can ask her about that because it's cross-exam and he's free to

21 bring it up. But what he's doing now is he's been specifically

22 prohibited -- what dPi is doing is they've been specifically

23 prohibited from augmenting their testimony to add this through

24 this witness because it was done at the last minute. Now

25 they're waiting even later and they're trying to elicit this

FLORIDA PUBLIC SERVICE COMMISSION

136

1 testimony from the witness on the stand. So I think it is a

2 circumvention of the Commission's prior order, it's a violation

3 of your procedures and it just shouldn't be allowed. Again, he

4 can deal with this through Ms. Tipton, if he wishes to.

5 MR. MALISH: Commissioner McMurrian, Mr. Carver, if

6 he had an objection like that, he waived it when Ms., when

7 Commissioner Argenziano asked the same question and he did not

8 object. So Commissioner Argenziano has opened the door. There

9 was no objection. This is now a proper matter for clarifying

10 reexamination. The question has been asked. It is important

11 to the Commission to know the answer. It's been asked of

12 Mr. Bolinger. He is allowed to respond to it. If Mr., if

13 Mr. Carver's objection was ever valid, he waived it when he let

14 the door open on this subject. I'm sorry, but that's just the

15 way it is.

16 COMMISSIONER McMURRIAN: Well, thank you, Mr. Malish,

17 for telling me the way it is.

18 MR. MALISH: I'm sorry. I get carried away.

19 COMMISSIONER McMURRIAN: Staff, would you, would you

20 please respond to what we've heard about the question and

21 whether it's gone outside the scope of the cross-examination?

22 I know that we asked a lot of questions and, quite frankly,

23 I've sort of lost track of if the redirect that Mr. Malish is

24 asking is on point with the cross-examination that was asked.

25 Or why don't we do this. I think we all need a

FLORIDA PUBLIC SERVICE COMMISSION

137

1 break. Let's give everyone time to think about it and we will

2 rule on that objection and start back at that point.

3 Commissioner Skop.

4 COMMISSIONER SKOP: Also, too, in considering the

5 Chair's request, can you also opine as to whether a

6 Commissioner question opened the door, because I don't think

7 the Commissioners are on trial here. So I just, I just think

8 that we should be free to ask questions, but that necessarily

9 on a procedural basis doesn't open the door in the manner in

10 which it's been alleged. Thank you.

11 MS. TAN: Certainly. That sounds good. We'll go

12 ahead and --

13 COMMISSIONER McMURRIAN: I think it may not hurt for

14 us to sort of look back at where we've been in the last few

15 minutes and think about that before, before I make a ruling on

16 that. So we'll take a lunch break.

17 Commissioners, how long would you like? At least an

18 hour?

19 COMMISSIONER ARGENZIANO: Give staff time.

20 COMMISSIONER McMURRIAN: Yeah. Give them time. An

21 hour okay? Okay. I guess we will come back at 10 'til 2:00.

22 We're adjourned until 10 'til 2:00.

23 (Recess taken.)

24 We'll reconvene the hearing. And I believe when we

25 broke we were going to hear from staff and some Commissioners

FLORIDA PUBLIC SERVICE COMMISSION

138

1 had questions for staff and we were getting direction from them

2 regarding the objection that was put forward. So I'll turn it

3 over to Ms. Tan.

4 MS. TAN: Thank you. It is staff's recommendation or

5 belief that the Commissioners are allowed to ask whatever they

6 want regarding dPi. However, this certainly does not open the

7 door for dPi to introduce testimony that the Commission has

8 previously denied. The purpose of redirect is to rehabilitate

9 the witness from cross. However, Mr. Carver is correct in that

10 this appears to be leaking into the testimony that was denied.

11 Therefore, staff advises that Mr. Malish ask, reask his

12 previous question only.

13 COMMISSIONER McMURRIAN: Commissioners, any other

14 questions before I go ahead? Okay.

15 All right, Mr. Malish, I'm going to take staff's

16 recommendation and we'll let you ask that one question and then

17 I think we need to move on from there.

18 MR. HORTON: Commissioner, could I ask for some

19 clarification?

20 COMMISSIONER McMURRIAN: Sure.

21 MR. HORTON: I understand this ruling, but I think in

22 every hearing I've been involved, if a Commissioner asked a

23 question, the company was allowed to follow up and get some

24 clarification. I understand this ruling. But, but are -- is

25 the recommendation that we can't follow up on a Commissioner's

FLORIDA PUBLIC SERVICE COMMISSION

139

1 question?

2 COMMISSIONER McMURRIAN: No. That's not the way I

3 understand it, and we can turn back to them. But the way I

4 understand it is that Commissioners, of course, can ask

5 questions and go wherever they may and ask whatever questions

6 that interest them, and I think that on redirect I think you

7 can address those questions. But as Lee Eng, as Ms. Tan,

8 sorry, said, that the purpose of redirect is to rehabilitate

9 the witness. I don't think that it opens the door to anything

10 that might be related to a question the Commissioner brought

11 up. I don't think that because they brought up something on a

12 subject that you can raise a question on any subject. Now feel

13 free to respond because I'm learning this, too.

14 MR. HORTON: Well, I think -- I know many times, in

15 fact, we just had a hearing where we followed up on some

16 Commissioners' questions. Commissioners are certainly free to

17 ask anything that they have an interest in, but sometimes there

18 may be instances where the witness's response doesn't go -- is

19 confused or isn't quite complete, and I think in every instance

20 counsel has been allowed to follow up and clarify the record

21 for the purpose. I agree it doesn't open the door to a whole

22 lot of brand new testimony, but --

23 MS. CIBULA: And if I could interject, there's also

24 the problem where there's testimony that wasn't allowed in this

25 proceeding, and I think the problem is that we're leaking into

FLORIDA PUBLIC SERVICE COMMISSION

140

1 that testimony and it was specifically not allowed and that's

2 the problem we're having.

3 COMMISSIONER McMURRIAN: Commissioner Argenziano.

4 COMMISSIONER ARGENZIANO: Because I'm fairly new at

5 this also and I'm not sure sometimes of the quasi-judicial --

6 and due process, I want to make sure there's always due

7 process. But to be quite frank, there are things that have

8 been discussed today that opened up information that had I

9 known about previously I may not have voted not to enter that

10 information into the record. So that's why I asked those

11 questions because there are things becoming apparent that I

12 needed to have to make a logical and fair determination. So in

13 due respect with that, I know we voted against it, to move to

14 have that introduced. But because of the fact there was so

15 much information that was coming up, I thought those questions

16 were pertinent, not meaning to get into the whole, the whole

17 thing here. But if I had known that, some of that information

18 ahead of time, I may have had a different vote at the

19 beginning.

20 COMMISSIONER McMURRIAN: I think that's perfectly

21 appropriate. And I, and I wasn't meaning to say at all that

22 Commissioners shouldn't ask questions about the stuff that

23 didn't come in. I think that's perfectly okay. And I think,

24 as we were talking about with Mr. Horton, I think that

25 following up on those things that are raised is okay. I think

FLORIDA PUBLIC SERVICE COMMISSION

141

1 that if they start trying to veer because it's somehow related

2 to something in testimony that wasn't allowed and that it's

3 really just a backdoor way of perhaps getting into that

4 testimony, I don't think that's appropriate. And I think we

5 were getting to that line.

6 MR. HORTON: Well, Commissioner, to that, and I know

7 you don't want to prolong this, but, but -- and even Mr. Carver

8 earlier -- I don't think the fact that you did not allow our

9 testimony to go in means that we do not have an opportunity to

10 cross-examine on some of, some of the points that would have

11 been brought out on that testimony had it been allowed to go

12 in. So I, I -- if, if the staff is saying that we can't

13 address anything that was in that testimony, I would certainly

14 disagree with that because I think that we do have the

15 opportunity in cross-examination to bring some of those points.

16 I think that's perfectly appropriate.

17 COMMISSIONER McMURRIAN: It was my understanding,

18 too, Mr. Horton, that, and I think we talked about this this

19 morning whenever that testimony wasn't in, that you still would

20 have the ability to try to get in certain information through

21 cross as long as you were following the normal procedures and

22 guidelines for appropriate cross and redirect and that sort of

23 thing. But that doesn't mean that, you know, you'll

24 necessarily be successful in getting it in. It depends, of

25 course, on the rules at the time. But --

FLORIDA PUBLIC SERVICE COMMISSION

142

1 MR. HORTON: I understand. Thank you, ma'am.

2 COMMISSIONER McMURRIAN: Anything else? And if you

3 want to clarify something I've said, because, of course, I'm

4 not an attorney either, so bear with me. Anything else?

5 Commissioners?

6 Okay. I guess we'll move along. Mr. Malish, it's --

7 Mr. Malish, you can continue your redirect.

8 MR. MALISH: Thank you.

9 COMMISSIONER McMURRIAN: With that understanding that

10 we need to move along.

11 BY MR. MALISH:

12 Q Mr. Bolinger, I believe that Commissioner Argenziano

13 had a question for you earlier before lunch asking basically is

14 there a comparison between the kinds of orders that dPi is

15 processing, that is, or submitting for promotions, namely 1FR

16 plus HBG plus BCR plus BRD blocks and the kinds of orders that

17 AT&T is getting and awarding promotions on from its retail

18 customers?

19 A The answer to that question is that in my opinion,

20 absolutely, yes. I mean, their customers don't order the way

21 our customers order as, in as high a percentage. But in

22 reviewing the data that they submitted, the answer is, is

23 without a doubt, yes, that they are customers who order like

24 our customers did, did receive the credits.

25 Q Okay. Now there's another topic that was discussed

FLORIDA PUBLIC SERVICE COMMISSION

143

1 before lunchtime, which was the issue of, you know, whether a

2 specific particular individual customer of yours, you know, I

3 don't know if you were saying John Smith or John Doe or

4 whatever, the question was brought up whether, you know, if

5 y'all apply for a promotion on a telephone line that's assigned

6 to John Smith, whether that, whether that is directly passed on

7 to the customer. Do you recall that line of inquiry?

8 A Yes.

9 Q Okay. And what was the answer to that?

10 A If it's directly passed on to the customer, like to a

11 John Smith? The answer is, is we don't go back and pass it on

12 to Mr. Smith's personal account, no.

13 Q Is there a reason for that?

14 A Well, there is -- the specific reason why we don't

15 individualize it is that even though on BellSouth's BAR form

16 that we have to fill out to apply for our credits, I believe

17 it's at a BTN or a billing telephone number level. When we

18 receive the credits back from BellSouth, they come in a lump

19 sum credit per BAN or billing account number. And so a billing

20 account number and a billing telephone number are two

21 completely different things. A billing telephone number is on

22 an individual basis. A billing account number, you know, and

23 I'll just throw numbers out, but we may have, let's say, 15,000

24 customers in a particular area with BellSouth and they may be

25 on five different BAN numbers. So if you just get a lump sum

FLORIDA PUBLIC SERVICE COMMISSION

144

1 credit on one BAN, you have no idea at a billing telephone

2 number level what customers were approved and what were denied,

3 and rarely do we ever see 100 percent approval. So you can't

4 pass it through to Mr. Smith.

5 MR. MALISH: We'll pass the witness.

6 COMMISSIONER McMURRIAN: Commissioner Skop.

7 MR. MALISH: Actually I think I have to admit the --

8 COMMISSIONER McMURRIAN: Commissioner Skop has a

9 couple of questions and then we'll do that. That will give you

10 a few minutes to get situated.

11 COMMISSIONER SKOP: Thank you. Just, I just had two

12 quick questions or actually one question and then just a

13 general comment. But I just wanted to know whether dPi's

14 strategy to take advantage of the LCCW promotion, was that

15 developed in-house or was that developed through a third party?

16 THE WITNESS: The -- I think I worked on that, I

17 personally worked on that promotion with the help of Mr. Watson

18 and Lost Key. And the way it would typically work at that time

19 back in 2003, I think, was that the promotions would be -- the

20 promotions at that time were very difficult to find. So it

21 wasn't -- it's not like, you know, BellSouth would knock on our

22 door and say, "Hey, we've got this promotion here that you can

23 take advantage of." So we would have to go digging through

24 documents to try and find what was going on at the time. And

25 when you found one -- that was part of Mr. Watson's job was to

FLORIDA PUBLIC SERVICE COMMISSION

145

1 find them and bring them to me and say, "Hey, these are the

2 promotions going on." And then we would sit down and look at

3 how we were doing business, what the, what the tariff was, if

4 we, if we, if our packages that we were ordering met the

5 requirements, excuse me, and, if not, should we change up a

6 package to meet the requirements to get a promotion, things of

7 that nature. So I would say they were developed in-house with

8 Lost Key's help.

9 COMMISSIONER SKOP: So just I guess as a follow-up to

10 that then. I guess would it be true to say that Mr. Watson was

11 retained as a consultant by your firm?

12 THE WITNESS: Yes.

13 COMMISSIONER SKOP: Okay. And then just as a general

14 point -- and, again, you know, I tried to follow what's going

15 on here. But in looking at the dPF -- or dPi-FL-5 thing with

16 the summary of what they're looking to claim as monies owed, I

17 noted that it appears to be $68,000. And I guess, you know,

18 certainly it's within the rights of the parties to litigate

19 disputes that arise. And -- but just in the totality of the

20 circumstances it seems like a tremendous amount of resources

21 are being put into such a small number, and, you know, the

22 resources of the Commission are valuable also. And I just

23 wonder if the, if the parties have ever engaged in good faith

24 settlement negotiations to try and resolve this dispute between

25 them. I mean, because it seems like there is a lot of

FLORIDA PUBLIC SERVICE COMMISSION

146

1 resources being expended over a very small number, and I'd just

2 like to get some feedback from either of the parties or the

3 witness as appropriate.

4 THE WITNESS: I would say that we have had -- first

5 of all, I'd say I agree with you, and being here is the last

6 place that we wanted to be. And we've never been here, as a

7 company we have never been in one of these actions before this,

8 the totality of this thing. The problem is we filed a claim in

9 North Carolina and were instructed by BellSouth that unless we

10 had a docket number in every state, they were going to collect

11 in all other states, and so we had to file in every single

12 state.

13 That being said, we have, we have talked settlement.

14 It's debatable whether or not it was in good faith, but we have

15 talked settlement and reached an impasse very quickly.

16 COMMISSIONER SKOP: Thank you. I respect that. I

17 just wanted to -- you know, it's always good when the, when the

18 parties can reach agreement such that the resources don't need

19 to be expended on litigating the matter. Thank you.

20 THE WITNESS: You're welcome.

21 MR. MALISH: And, Commissioner Skop, I think that

22 although Florida is a fairly small number, the totality of the

23 BellSouth states added up to closer to a million.

24 COMMISSIONER SKOP: And, believe me, I have a full

25 appreciation for what's really going on here. So that's --

FLORIDA PUBLIC SERVICE COMMISSION

147

1 again, I'm just trying to just lay it out on the table. Thank

2 you.

3 COMMISSIONER McMURRIAN: Mr. Carver, before we leave

4 that topic, is there anything you want to say since Mr. Malish

5 added something? I just think it should be fair.

6 MR. CARVER: Yeah. No. I don't disagree with, with

7 the statement that there have been negotiations. Actually we

8 had -- the case was originally set to go to hearing in October

9 and just a couple of days before the trial the parties filed a

10 joint motion to continue the case so that we could try to

11 discuss settlement negotiations. And we tried to have a global

12 settlement and talk about all nine states and that effort went

13 on for a number of weeks and it just didn't work out. So I

14 think at this point -- I mean, I guess each side has a

15 different view as to who was being reasonable and who wasn't,

16 but I can assure you that we've had global discussions and they

17 went on for a period of weeks late last year.

18 COMMISSIONER SKOP: And just as a follow-up to that,

19 global settlements are nice, but I'm more concerned with the

20 issue before us in Florida.

21 MR. CARVER: Well, we tried to split it out by states

22 because, because -- it just hasn't worked, that hasn't worked

23 out either unfortunately. And we do have -- I mean, we have,

24 just as a point of information, in Louisiana the amount in

25 controversy is about $12,000. So you'd think certainly we'd be

FLORIDA PUBLIC SERVICE COMMISSION

148

1 able to settle that, but we haven't even been able to get that

2 done. But we have tried.

3 COMMISSIONER SKOP: Thank you.

4 COMMISSIONER McMURRIAN: Mr. Malish.

5 MR. MALISH: And we will be talking more about

6 Louisiana.

7 COMMISSIONER McMURRIAN: All right. You probably

8 need to address exhibits, if any.

9 MR. MALISH: The only exhibit that we -- yeah. The

10 only exhibit that was brought up with Mr. Bolinger's testimony

11 is the one that we marked at the end, Exhibit 27, which is the

12 screen shot that was captured from the AT&T website. And it

13 has -- the title we're going to use for this one is USOC Lookup

14 Tool. That's Number 27, which we offer at this point.

15 COMMISSIONER McMURRIAN: Okay. Mr. Carver, any

16 objection?

17 MR. CARVER: No objection.

18 COMMISSIONER McMURRIAN: Okay. Show it entered into

19 the record.

20 (Exhibit 27 admitted into the record.)

21 And I believe, Mr. Bolinger, you're excused.

22 (Transcript continues in sequence with Volume 2.)

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FLORIDA PUBLIC SERVICE COMMISSION

149

1 STATE OF FLORIDA )

: CERTIFICATE OF REPORTER

2 COUNTY OF LEON )

3

4 I, LINDA BOLES, RPR, CRR, Official Commission

Reporter, do hereby certify that the foregoing proceeding was

5 heard at the time and place herein stated.

6 IT IS FURTHER CERTIFIED that I stenographically

reported the said proceedings; that the same has been

7 transcribed under my direct supervision; and that this

transcript constitutes a true transcription of my notes of said

8 proceedings.

9 I FURTHER CERTIFY that I am not a relative, employee,

attorney or counsel of any of the parties, nor am I a relative

10 or employee of any of the parties' attorneys or counsel

connected with the action, nor am I financially interested in

11 the action.

12 DATED THIS \_\_\_\_\_\_\_\_\_\_ day of April, 2008.

13

14 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

LINDA BOLES, RPR, CRR

15 FPSC Official Commission Reporter

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