

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:) DOCKET NO. 050863-TP
)
dPi Teleconnect, L.L.C. v.)
BellSouth Telecommunications, Inc.)

FIRST AMENDED REBUTTAL TESTIMONY OF STEVE WATSON ON BEHALF OF dPi TELECONNECT

Q: I know you have reviewed Bellsouth’s direct testimony. What’s your response?

A: I find it twisted that BellSouth seems to suggest that dPi is trying to defraud BellSouth. The first question one should be asking is – “Why can’t BellSouth bill the CLECs correctly to begin with?” Why is this whole “credit” process necessary to begin with? BellSouth’s retail customers are billed correctly when they signed up. If Bellsouth retail customers signed up thinking (correctly) that they were entitled to special promotional pricing, only to find out that he or she had been billed much more, there would be an uproar. This agency and the Attorney General’s office would be flooded with complaints. Because at bottom, to consistently overcharge for service in this way is a “bait and switch” deceptive trade practice.

Bellsouth is attempting to shift the Commission’s attention from the “white elephant in the middle of the room” – namely, that the practical effect of Bellsouth’s “promotion process” is to unjustly enrich Bellsouth at the expense of its small competitors.

Q: Please explain.

A: It is grotesque that Bellsouth cannot bill resellers the correct amount (including promotional discounts) for the services they order when the order is submitted. I know from

1 experience that SBC (before its merger with BellSouth) did so: SBC's systems allowed one
2 to apply for a promotional credit as part of the provisioning order, and rejected the order if
3 it does not qualify for the promotion. The credit was applied to the price immediately and
4 the discount reflected on the same bill; the CLEC paid no more than what it actually owed
5 for the service from the get-go.

6 But in contrast (as I noted earlier), the practical effect of Bellsouth's refusal to bill
7 these charges correctly on the front end means that Bellsouth automatically overcharges
8 every reseller for every service the reseller orders that is subject to a promotional discount.
9 Then Bellsouth shifts the burden on to the reseller to figure out how much Bellsouth has
10 overcharged the reseller, and dispute Bellsouth's bills accordingly. Some CLECs I have
11 worked with aren't even aware that this is how the "system" is supposed to work and don't
12 know to apply for these promotions; in such cases, Bellsouth obviously just keeps their
13 money.

14 Again, for those CLECs who generally understand that they must apply for these
15 credits, Bellsouth's system makes it as difficult as possible for the reseller to dispute the bills
16 to Bellsouth's satisfaction. First, the credit request must be meticulously documented, listing
17 details of every order for which credit is requested. But getting the data to populate these
18 forms is a Herculean task in itself: it must come from Bellsouth's billing and ordering data,
19 which Bellsouth has traditionally provided to resellers only on either a paper bill, or
20 electronically in a "DAB" file, which has data locks built into it, making downloading of the
21 raw data exceptionally difficult. To make matters worse, next to no one at Bellsouth can
22 explain how to get the data out of the "DAB" files, because Bellsouth does not maintain its

1 own data in such files, and its employees simply are not equipped with the knowledge to
2 answer questions about how to unlock its secrets. Figuring out how, as a practical matter,
3 to apply for these credits takes a large amount of resources in time and money. As you can
4 imagine, this has resulted in a great many CLECs simply throwing their hands in the air and
5 giving up. Bellsouth keeps their money too. I know of several CLECs that have gone out
6 of business who never realized before they went under that Bellsouth actually owed them
7 hundreds of thousands of dollars in promotional credits.

8 Next, if a CLEC spends the time and resources to figure out a way to get at their data,
9 and create systems for electronically scouring it to identify those orders that ought to qualify
10 for promotional credits, and write and re-write programs that will populate Bellsouth's forms
11 (which it changes from time to time as it sees fit), Bellsouth will examine the requests for
12 credit to see if it will honor them. There is no deadline for Bellsouth to act on these credit
13 requests. When it finally approves or denies credits – which can take months – it makes no
14 explanation for what credits it accepts, and what credits it rejects, and why. If the credit is
15 rejected, the CLEC has no way of auditing the rejection to see if it is merited or not. If the
16 credit is accepted, Bellsouth has kept the CLEC's money for months without interest before
17 returning it.

18 BellSouth's system is backwards, failure prone, and grossly inefficient. And at every
19 step of the way, whether consciously designed to that end or not, the system works to the
20 profit and unjust enrichment of Bellsouth at the CLEC's expense.

21 **Q: In what manner did dPi decide to apply for credits?**

22 A: Basically by doing what Bellsouth has asked us to do. When I first got involved in

1 trying to claim credits on behalf of CLECs, back in 2003, Bellsouth's "promotional credit
2 processing department" appeared to consist of one person: Stanley Messinger; he was later
3 replaced by Kristy Seagle, who was in turn superseded by Keith Deason in the second half
4 of 2005. These were the people tasked with helping CLECs navigate the promotional credit
5 filing process – that is, verifying what promotions CLECs were in fact eligible for, and how
6 to apply and secure those credits. I don't know how this "department" fit into Bellsouth's
7 organizational structure, but they were not part of Bellsouth's billing and collections
8 department, nor were they part of Bellsouth's wholesale operations. It was obvious when I
9 first started calling that they simply didn't get many promotional credit requests, nor any
10 questions about how to qualify and apply for such credits. Frequently they did not know the
11 answers to questions on these subjects, and sometimes a decision by one person would be
12 reversed by his or her successor. Oftentimes, it seems that policies were made on the spot,
13 on an *ad hoc* basis. In essence, we were feeling our way through "the system" together, and
14 I relied on what they told me about what was creditable and how to apply for those credits.
15 As CLECs began to figure out that they were entitled to promotion discounts, and how to
16 apply for them, the credit requests grew, to the point that in later 2004, Bellsouth began to
17 spend more resources on managing the influx of requests – redoing forms and processes and
18 so on.

19 **Q: What merit is there in Bellsouth's hints that dPi has cheated the system?**

20 A: None. Bellsouth's suggestion that dPi somehow cheated the system is simply
21 incredible to me. First, we worked with Bellsouth's staff in order to try to apply for these
22 credits as directed by Bellsouth. dPi simply cannot be blamed for following Bellsouth's

1 directions. Second, Bellsouth conveniently fails to mention those situations – for example,
2 with the CREX one time nonrecurring charge – that when the parties revisited whether it was
3 appropriate for dPi to have those charges credited, and concluded that it was not, these claims
4 were immediately dropped. dPi acted in good faith and stopped pursuing those credits that
5 it was not entitled to. It is only asking BellSouth to credit amounts to which dPi is entitled.
6 To have that somehow twisted to make dPi look like the bad actor is skewing the facts in the
7 worst possible way.

8 Finally, Bellsouth fails to acknowledge that those instances of “double-dipping” the
9 Secondary Service Charge Waiver are statistically inconsequential. Transcr. Pam Tipton p.
10 15 (July 23, 2007). The overwhelming amount of credit applied for and denied were for the
11 Line Connection Charge Waiver (“LCCW”) Promotion, which accounts for more than 98%
12 (\$78,947.73 of the \$80,428.17) of the dollars at issue between the parties. In the parallel
13 proceeding in North Carolina, the vast majority of the time, dPi was denied credit under this
14 promotion because Bellsouth refused to “count” as Touchstar features those features selected
15 by dPi, such as the Touchstar blocks. This is the case in Florida as well. Seventy-five
16 percent of all amounts denied for LCCW (\$58,210 of \$78,947) were denied because AT&T
17 did not count blocks as Touchstar features – even though they are listed as such in the tariff.

18 **Q: How did dPi qualify for LCCW promotions it applied for?**

19 A: All – *ALL* – dPi has to do to qualify for the line connection charge waiver is
20 purchase Basic Service with one or more Touchstar features.¹ In every situation in which dPi

1

See dPi Exhibit 3, a screenshot taken from Bellsouth’s website during the summer of 2005. In relevant part, the promotion provides:

Connection Fee Waived

1 applied for the promotional credit, it ordered at least Basic Service plus two or more
2 Touchstar features, including Touchstar blocks.² In short, using the words from Bellsouth's
3 own promotion, dPi is entitled to the promotion because it has "purchase[d] ... Bellsouth
4 Basic Service with at least one feature" and thus has "qualif[ied] for a waiver of the local
5 service connection fee."

6 Bellsouth initially agreed with this interpretation because when we were first getting
7 set up and running test batches together, it approved all orders configured this way.
8 Furthermore, after initial testing, BellSouth was crediting other CLECs (such as Budget
9 Phone) with millions for promotional rates for orders essentially identical to dPi's.
10 BellSouth now claims it was "fleeced" by these CLECs – yet BellSouth has never attempted
11 to backbill, bring a claim, or otherwise seek recovery of these amounts – despite the fact that
12 it routinely aggressively pursues backbilling and collections efforts in connection with other
13 claims.

14 The reality is that at some point Bellsouth determined that if they interpreted the
15 promotion the way they profess it should be interpreted now, they could avoid paying these
16 credits to CLECs without unduly affecting their own client base, since so few of BellSouth's
17 customer base would take basic service with just the blocks. This is because the product that

Customers who switch their local service to Bellsouth from another provider and purchase Bellsouth® Complete Choice®, Bellsouth® Preferred Pack, or Bellsouth Basic Service with at least one feature can qualify for a waiver of the local service connection fee. Customers must not have had local service with Bellsouth 10 days prior to new service connection date. Offer ends December 26, 2005.

2

dPi's basic offering always includes the Touchstar blocks. There is no dispute that dPi has ordered Touchstar blocks – the dispute is solely whether the Touchstar block features that dPi orders "qualify" as Touchstar features under the promotion because they bear no additional charge.

1 dPi sells, which is a set-rate bill which prevented the user incurring accidental or
2 unauthorized additional charges, is more attractive for dPi's customer base but not
3 BellSouth's. In order to prevent the end user from incurring extra charges, call blocks were
4 placed on the lines. Such a product meant that typical order of a customer with poor credit
5 – the profile of virtually all of dPi's customers – would qualify for the promotion with the
6 two blocks. The typical order of a customer with good credit – who tended to be Bellsouth's
7 customers – would not have these blocks.

8 Once Bellsouth realized this, it switched its interpretation of the promotion. No
9 longer would the LCCW be credited if the order met the plain language of the qualifying
10 criteria but only if it met the tortured reading of the promotion that favored Bellsouth.
11 Bellsouth displays its tortured reading most clearly in Pam Tipton's sly change of language
12 in her testimony that the customers did not qualify because "many of these dPi end users did
13 not **purchase any features.**" Transcr. Pam Tipton p 10 (July 23, 2007) (bold added). Of
14 course, nothing in the promotion required dPi's customers to **purchase features**, but rather
15 to **purchase service** with Touchstar features. In reading the promotion qualification,
16 Bellsouth must completely ignore its ten-word listing of different qualifying services to reach
17 the result it wants.³

18 This is the heart of the dispute. Bellsouth hopes dPi (and the Commission) merely
19 glosses over the promotion without attempting a precise reading of the promotional language.

3

In relevant portion, "Customers who switch their local service to Bellsouth from another provider and **purchase Bellsouth® Complete Choice®, Bellsouth® Preferred Pack, or Bellsouth Basic Service** with at least one feature can qualify." Bellsouth has to skip over everything bolded to reach its desired result. See footnote one for the complete text of the promotion.

1 If one is precise and accurate, it is plain and obvious that dPi should be credited for the
2 LCCW.

3 **Q: So in short, this case is reduced to whether dPi is entitled to promotional credits when**
4 **it orders Basic Service plus Touchstar block features because it has “purchase[d] ...**
5 **Bellsouth Basic Service with at least one feature” and thus has “qualif[ied] for a waiver**
6 **of the local service connection fee.”**

7
8 A: Essentially. And as Brian Bolinger said, there is no getting around the fact that dPi
9 has in fact ordered Basic Service with Touchstar features. If Bellsouth does not wish its
10 promotion to apply to all Touchstar features, it should do like SBC did, and alter its
11 promotion so that the promotion specifically lists those features that Bellsouth requires to
12 qualify for the promotion.

13 The Commission should hold Bellsouth to the plain language of the qualifying
14 criteria that Bellsouth *itself* created and force Bellsouth to interpret it in the manner Bellsouth
15 *itself* originally interpreted it. It is only now, after it has become clear that more dPi
16 customers qualify for the promotion than Bellsouth customers, that Bellsouth changed its
17 interpretation.

18 dPi’s orders meet the qualifying criteria exactly, and should be credited.

19 **Q: What about Bellsouth’s claim that dPi wrongly submitted claims for transfer orders?**

20 A: We have reviewed Bellsouth’s position on this, and compared it to the language of
21 the promotion. We agree upon further consideration that the promotions should not apply
22 to transfers.

23 **Q: Does this conclude your testimony?**

24 A: For now. But I reserve the right to supplement or amend it at hearing.

1 Respectfully Submitted,
2

3 **FOSTER MALISH BLAIR & COWAN, LLP**

4 
5
6

7 Chris Malish
8 Texas Bar No. 00791164
9 cmalish@fostermalish.com
10 Steven Tepera
11 Texas Bar No. 24053510
12 stepera@fostermalish.com
13 1403 West Sixth Street
14 Austin, Texas 78703
15 Phone: (512) 476-8591
16 Fax: (512) 477-8657
17