at&t

Manuel A. Gurdian
Attorney
Legal Department

AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

T: (305) 347-5561
F: (305) 577-4491
manuel.gurdian@att.com

July 21, 2008

Ms. Ann Cole, Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Notice of Filing an Order Denying dPi's November 19, 2007 Motion to Reconsider in Docket No. P-55, Sub 1577 before the State of North Carolina Utilities Commission, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

cc: All parties of record
Gregory R. Follensbee
E. Earl Edenfield, Jr.
Lisa S. Foshee

CERTIFICATE OF SERVICE
DOCKET NO. 050863-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 21st day of July, 2008 to the following:

Theresa Tan
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
ltan@psc.state.fl.us

Christopher Malish Steven Tepera **(+)**
Foster Malish Blair & Cowan LLP
1403 West Sixth Street
Austin, TX 78703
Tel. No. (512) 476-8591
Fax. No. (512) 477-8657
chrismalish@fostermalish.com
steventepera@fostermalish.com
Counsel for dPi

DPI-Teleconnect, LLC
2997 LBJ Freeway, Suite 225
Dallas, TX 75234-7627
Tel. No. (972) 488-5500 x4001
Fax No (972) 488-8636
ddorwart@dpiteleconnect.com

Norman H. Horton, Jr.
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, FL 32308
Tel No. (850) 425-5203
Fax No (850) 558-0664
nhorton@lawfla.com

Manuel A. Gurdian

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.	)	Docket No. 050863-TP
	)	Filed: July 21, 2008

AT&T FLORIDA'S NOTICE OF FILING

BellSouth Telecommunications, Inc., d/b/a AT&T Florida ("AT&T Florida") hereby files the attached Order Denying dPi's November 19, 2007 Motion to Reconsider in Docket No. P-55, Sub 1577 before the State of North Carolina Utilities Commission.

Respectfully submitted this 21st day of July, 2008.

AT&T FLORIDA

E. EARL EDENFIELD, JR.
TRACY W. HATCH
MANUEL A. GURDIAN
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

for

LISA S. FOSHEE
J. PHILLIP CARVER
AT&T Southeast
Suite 4300, AT&T Midtown Center
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0710

716390

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1577

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Complaint of dPi Teleconnect, L.L.C. Against BellSouth Telecommunications, Inc. Regarding Credit for Resale of Services Subject to Promotional Discounts	))))	ORDER DENYING dPi's NOVEMBER 19, 2007 MOTION TO RECONSIDER

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, and Chair Edward S. Finley, Jr.

APPEARANCES:

For dPi Teleconnect, L.L.C.:

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

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

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III, AT&T North Carolina, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

J. Phillip Carver, AT&T Southeast, 675 W. Peachtree Street NE, Suite 4300, Atlanta, Georgia 30375

BY THE COMMISSION: On August 25, 2005, dPi Teleconnect, L.L.C. (dPi) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking credit for resale of services subject allegedly to promotional discounts in accordance with their interconnection agreement. Among other things, dPi resells BellSouth's retail residential telephone services, some of which are subject to BellSouth promotional discounts. The discount dPi sought credit for in this proceeding is the Line Connection Charge Waiver (LCCW), which BellSouth gave to customers that purchased certain packages or features.

It was dPi's belief that some of its customers met the requirements of the LCCW by obtaining at least two of the following features: blocking per-use call return, blocking

repeat dialing, and blocking call tracing. BellSouth refers to these features by the codes BCR, BRD, and HBG, respectively. BellSouth charges customers for most custom calling features, but it furnishes BCR, BRD, and HBG to customers upon request, without charge. BellSouth believes that customers obtaining BCR, BRD, or HBG did not qualify for the discount because the promotion only provided the discount for purchased features.

On March 1, 2006, the Commission held an evidentiary hearing in Raleigh with witnesses from dPi and BellSouth presenting testimony and exhibits. On April 27, 2006, the Public Staff filed its Proposed Order and dPi and BellSouth filed briefs. On June 7, 2006, the Commission issued an Order Dismissing the Complaint. Specifically, the Commission held that dPi was not entitled to the credits that it sought because the interconnection agreement between BellSouth and dPi precluded a similarly situated BellSouth customer who only purchased basic service and received the two free blocking features provided by BellSouth from receiving the LCCW. In that Order the Commission stated:

> Under the clear language of this provision, promotions are *only* available to the extent that end users would have qualified for the promotion if the promotion had been provided by BellSouth directly. In Witness Tipton's testimony, she stated emphatically that BellSouth does not authorize promotional discounts to its End Users who only order basic services and the blocks provided by dPi. (Tr. pp. 245-247). This fact was uncontested by dPi at the hearing and unrebutted in its post hearing brief. The Commission assumes that, if dPi had any contradictory evidence, it would have brought that evidence to our attention. This fact is dispositive. Under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are *not* eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits. dPi's complaint should therefore be denied.
>
> June 7, 2006 Order, p. 7.

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

a. dPi is entitled to recover $2,537.70 for credits wrongfully denied on the grounds that a transfer, rather than a winover or reacquisition, was involved.

b. Applying the correct test, or basing the decision on the best evidence in the record, inexorably leads to the determination that dPi is entitled to LCCW promotion pricing when it purchases Basic Local Service plus two of the BCR, BRD, and HBG Touchstar features.

On October 12, 2006, the Commission denied dPi's motion to reconsider.

On October 26, 2006, dPi challenged the Commission's denial by filing a complaint in United States District Court for the Eastern District of North Carolina. dPi alleged that the Commission had erred by failing to award it the credits that it was due by failing to properly analyze the evidence presented and by inappropriately interpreting the interconnection agreement between dPi and BellSouth in violation of the Telecommunications Act of 1996. On September 25, 2007, United States District Court Judge James C. Dever affirmed the Commission's decision and denied dPi's request for relief. dPi appealed the decision to the United States Court of Appeals for the Fourth Circuit on October 18, 2007. Pursuant to Fourth Circuit rules, the parties were scheduled to mediate the dispute on December 7, 2007.

On November 19, 2007, dPi filed a motion with the Commission Clerk pursuant to G.S. 62-80 requesting that the Commission reconsider its decision dismissing the complaint against BellSouth. dPi alleged that, as a result of discovery that BellSouth provided to dPi in a companion proceeding before the Florida Public Service Commission (Florida Commission) on September 28, 2007, dPi had discovered evidence that the primary BellSouth witness in the proceeding before this Commission, Pam Tipton, had provided false testimony to this Commission and the Commission had relied upon such testimony in making its decision.

On December 17, 2007, dPi filed the Affidavit of Steven Tepera, an attorney in the firm representing dPi in these proceedings, in support of its motion to reconsider. On that same date, BellSouth filed its response in opposition to dPi's motion to reconsider. In its response, BellSouth asserted that the materials upon which dPi relied upon do not in any way invalidate the testimony given by Ms. Tipton in these proceedings for the following reasons: (1) dPi submitted no new evidence but instead "submitted cursory, vague, largely unexplained and completely unverified documents that would not [as a matter of law] be accepted by the Commission as evidence in a hearing"; (2) one cannot discern any insight as to how the LCCW promotion applied to BellSouth's retail customers from the evidence submitted by BellSouth at dPi's request; (3) dPi has attempted to utilize the information in a way that is untenable and misleading; and (4) even if one were to accept this information as reliable, it does not tell the whole story. BellSouth attached an Affidavit from Ms. Tipton in support of its response. BellSouth's response was accompanied by a cover letter which explained that dPi served BellSouth with the Tepera Affidavit on the day that it was filing the response and that BellSouth reserved the right to respond to the affidavit after it had a chance to review and digest the information contained therein.

On January 2, 2008, dPi responded to the response filed by BellSouth. dPi alleged that the bottom line was that, contrary to the original testimony of the BellSouth witness, BellSouth repeatedly and regularly waived the LCCW charge for those customers taking just basic service and two free Touchstar blocking features.

On January 22, 2008, BellSouth again responded to dPi's assertion by denying the merit of the allegations.

On March 7, 2008, the Commission issued an Order Scheduling Hearing for April 15, 2008 to receive evidence concerning dPi's factual allegation that BellSouth presented false evidence at the March 1, 2006 evidentiary hearing and BellSouth's response that dPi's allegations cannot be supported.

On March 14, 2008, the Commission issued a further Order Clarifying Procedure related to the evidentiary hearing scheduled for April 15, 2008. In that Order, the Commission notified the parties that Mr. Tepera and Ms. Tipton were necessary witnesses to the hearing and required their presence during the proceeding. Further, the Commission notified the parties that, "in lieu of prefiled testimony, the affidavits of Mr. Tepera and Ms. Tipton respectively may be identified by the witness, offered in evidence, and made a part of the record without further formality or explanation and the witness immediately tendered for cross examination."

On March 26, 2008, dPi filed the Direct Testimony of Mr. Tepera, Exhibits 10 and 13 and a Consolidated Exhibit List. On March 28, 2008, BellSouth Telecommunications, Inc., which is now known as AT&T North Carolina (AT&T or BellSouth), filed a Motion to Strike the Direct Testimony of Steven Tepera and the associated exhibits. In the Motion, AT&T asserted that the Commission's prior orders did not authorize the filing of prefiled testimony, that dPi had filed prefiled testimony without requesting prior leave of the Commission, that the procedures contemplated by the Commission were more streamlined than those ordinarily utilized by the Commission because the hearing was intended to focus on a specific factual allegation made by dPi, that allowing the testimony would be unduly prejudicial to AT&T; and, that permitting the testimony would result in a delay in the hearing to allow AT&T to respond to dPi's prefiled testimony and to allow dPi to respond to AT&T's response.

On April 1, 2008, dPi responded to BellSouth's motion to strike the testimony of Mr. Tepera. In its response, dPi asserted that the Order Clarifying Procedure did not preclude the introduction of prefiled testimony and that the introduction of such evidence would not unfairly prejudice BellSouth. On April 1, 2008, the Commission entered an Order Granting BellSouth's Motion to Strike the Direct Testimony of Steven Tepera and the associated exhibits.

Based on the foregoing, the evidence presented at the hearing, and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT

dPi's evidence is insufficient to justify a conclusion that Ms. Tipton provided false testimony during the March 1, 2006 hearing.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT

Pursuant to G.S. 62-80, the Commission has the authority, upon its own motion or upon motion by any party, "to reconsider its previously issued order, upon proper

notice and hearing" and "upon the record already compiled, without requiring the institution of a new and independent proceeding by complaint or otherwise." *State ex rel. Utilities Commission v. Edmisten, 291 N.C. 575, 582, 232 S.E.2d 177, 181 (1977).* At this rehearing, the Commission may rescind, alter, amend, or refuse to make any change to its earlier order. Id. An application for rehearing pursuant to G.S 62-80 is addressed to and rests in the discretion of the Commission. *State ex rel. Utilities Commission v. Services Unlimited, Inc., 9 N.C.App. 590, 591, 176 S.E.2d 870, 871 (1970).* Although the Commission can choose to rescind, alter or amend a final decision of its own accord pursuant to G.S. 62-80, the Commission may not, in the exercise of that discretion, arbitrarily or capriciously amend, modify or rescind a final order in the absence of some change in circumstance or misapprehension or disregard of fact which requires such amendment, modification or rescission in the public interest. *State ex rel. Utilities Commission v. N.C. Gas Service, 128 N.C. App. 288, 494 S.E.2d 621, 625 (1998); State ex rel. Utilities Commission v. Edmisten, 291 N.C. 575, 584, 232 S.E.2d 177, 182 (1977).*

Pursuant to the discretion granted in G.S. 62-80, the Commission permitted this proceeding to be reopened for the limited purpose of receiving evidence concerning dPi's factual allegation that BellSouth witness Tipton presented false testimony at the March 1, 2006 evidentiary hearing. Specifically, this hearing was convened to determine if witness Tipton testified falsely when she testified that BellSouth authorized promotional discounts to its End Users who only order basic services and the free blocks provided in BellSouth's plan. In its Post-hearing Brief, dPi attempted to widen the scope of our reconsideration to argue additional issues that were previously considered, such as the wisdom of allowing and relying upon the testimony of Ms. Tipton and the meaning of the terms included within the promotion. With regard to the former, dPi persists in arguing that Ms. Tipton's March 1, 2006 testimony was admitted in error. dPi goes so far as to assert that no court in the country would have admitted the testimony. Contrary to these assertions, the Commission was well within its right in admitting the testimony. The Commission is required to follow the rules of evidence applicable in civil actions "insofar as practicable." G.S. 62-65. "The procedure in the Commission is not, however, as formal as that in litigation conducted in the superior court. *State ex rel. Utilities Commission v. Carolina Telephone & Telegraph Co., 267 N.C. 257, 269, 148 S.E. 100, 109 (1966).* Under Commission procedures, admission of hearsay testimony is a permissible practice. *State ex rel. Utilities Commission v. Edgecombe–Martin EMC, 5 N.C. App. 680, 684, 169 S.E.2d 225, 228(1969).* With regard to the latter, the Commission decided in our June 7, 2006, Order that it need not determine the precise meaning of the terms of the promotion because it could rely upon the provisions in the parties' interconnection agreement to fully and finally dispose of the dispute before us.

BellSouth has asked the Commission to strike those provisions in dPi's Post-hearing Brief which went beyond the original limitations contained in our order permitting this hearing. Although we agree with BellSouth that the arguments contained in dPi's Post-hearing Brief stray far beyond the original limits that we established, i.e., whether Ms. Tipton provided false testimony when she testified that BellSouth did not grant the LCCW to its customers who only order basic service plus the free blocks, we,

in our discretion, decline to strike those portions of dPi's Post-hearing Brief as we are able to separate those portions of the argument contained therein which are relevant to the limited issue that this hearing was designed to address from those that have no relevance to this proceeding. Accordingly, BellSouth's motion to strike portions of dPi's Post-hearing Brief is denied.

On April 15, 2008, the matter was called for hearing by Presiding Commissioner James Kerr. As required by the March 14, 2008 Order, Mr. Tepera was duly sworn and his Affidavit of December 17, 2007 was identified, offered into evidence, and made a part of the record without further formality or explanation. In his testimony, Mr. Tepera stated that, as a result of discovery that BellSouth provided to dPi in a companion proceeding before the Florida Commission, dPi discovered that Ms. Tipton had provided false testimony to this Commission in the March 1, 2006, hearing and that the Commission had relied upon such testimony in making its June 7, 2006, decision. According to Mr. Tepera, the Florida discovery[1] demonstrated that, contrary to Ms. Tipton's testimony in the March 1, 2006, proceeding, BellSouth consistently awarded the LCCW promotion waiver to its end users who ordered basic service and two of the three free call blocks. According to Mr. Tepera, the exhibits that he introduced into evidence in this reconsideration hearing showed that:

1. From May 2003 to January 2005, new BellSouth retail accounts created with basic service and two TouchStar Blocking Features received a Line Connection Charge waiver between 40% and 22% of the time;

2. From January 2005 through August 2007, at least 2,562 new accounts with just basic residential service and at least two out of three of the TouchStar Blocking Features had had the Line Connection Charge waived; and,

3. From January 2005 to the time of the filing of Ms. Tipton's rebuttal testimony in February 2006, at least 493 new accounts were created in which basic service was purchased and two TouchStar Blocking Features were obtained, and the Line Connection Charge waived in Florida alone.

In Mr. Tepera's opinion, this was clear evidence supporting an inference that BellSouth awarded the LCCW promotion waiver to its end users because they ordered basic service and two of the three free call blocks despite its prior testimony to the contrary.

On cross examination, Mr. Tepera, a lawyer and aerospace engineer by training, admitted that he had never worked for a telecommunications company, had no specialized training or experience in the telecommunications industry and had no specialized training or knowledge regarding computerized billing systems in general and AT&T's systems in particular. Further, Mr. Tepera admitted during cross examination that one could not discern the specific reason that an individual customer was granted the line connection waiver from this compilation of the data. T pp. 54-56. Further, in

[1] At the hearing, both dPi and BellSouth individually acknowledged that the data that was provided in Florida was applicable to the dispute in North Carolina because BellSouth has a regional system and the data is consistent from state to state. T pp. 13 and 18.

response to the questioning by Commissioner Kerr, Mr. Tepera conceded that, due to the limitations inherent in the data: (1) there was no way to tell from the data provided if the customers that received the waivers were otherwise eligible for the LCCW promotion waiver primarily because the data did not indicate if the customers receiving the waivers were reacquisition or winback customers, a necessary precondition for receiving the LCCW waiver, and (2) there was no direct evidence that that BellSouth granted the LCCW waiver to its customers because they only ordered basic service and received the two free blocking features.

Despite these admissions, Mr. Tepera asserted that a strong inference should be drawn from the evidence that BellSouth did indeed give the LCCW promotion waivers to customers because they only ordered basic plus two of the free block from the fact that BellSouth gave out such a high number of waivers. Mr. Tepera reasoned that a significant percentage of those waivers given during the periods examined must represent the application of the promotion to BellSouth's own customers because the alternative explanations given by BellSouth for the number of waivers granted, such as disconnects in error, hurricane reconnects, *etc.*, simply did not suffice to explain the large number of waivers granted. T p. 58. According to Mr. Tepera, the only reasonable explanation for this high number of granted waivers is that BellSouth granted the LCCW waiver promotion to customers because they ordered basic plus two of the three free blocks.

Ms. Tipton was duly sworn and her Affidavit of December 17, 2007 was identified, offered into evidence, and made a part of the record. Ms. Tipton stated in her affidavit and testimony that she stood by the accuracy of her testimony in the March 2006 hearing; that BellSouth did not give the LCCW promotion waiver to customers because they ordered basic service plus two free blocks; that BellSouth customers who order basic service plus two free blocks were not eligible for the LCCW promotion; that it is impossible to tell from the data provided to dPi whether the line connection waivers that were granted in the orders examined resulted from the LCCW promotion or for some other reason; that the data provided to dPi, when examined closely, does not prove dPi's contention; and that she examined a random representative sample of the actual orders provided to dPi pursuant to the discovery request and that none of that information provided any indication that the waiver had been granted as a result of the LCCW promotion. During cross examination, Ms. Tipton admitted that she does not have evidence that will demonstrate with one hundred percent certainty that BellSouth did not grant LCCW promotion waivers to BellSouth customers that ordered only basic service plus the free call blocks.

In assessing the relative merits of the arguments presented by the parties at this stage of the proceeding, the Commission notes that this hearing was convened for the limited purpose of determining whether Ms. Tipton testified falsely that BellSouth did not authorize promotional discounts to its End Users because they ordered basic services and the free blocks provided in BellSouth's plan in the March 2006 hearing. Accordingly, we have carefully examined the "statistical" evidence that dPi presented in support of its contention that Ms. Tipton's testimony was false.

In its June 7, 2006, Order the Commission accepted and relied upon BellSouth witness Tipton's testimony at the March 1, 2006 hearing that BellSouth did not grant its customers the LCCW promotion because they ordered basic service, plus the blocking features. The Commission granted dPi's motion to reconsider because dPi made the rather serious allegations that Ms. Tipton's testimony was false and that dPi was prepared to prove this allegation with evidence unavailable to it at the March 1, 2006 hearing. In a motion to reconsider, the burden to prove the allegation that evidence admitted and relied upon in the hearing in chief was faulty rests squarely on the movant. This is especially the case where the movant alleges that the witness whose testimony the Commission relied upon testified falsely. dPi's has not presented any direct evidence in its testimony or post hearing filings to support its allegations that Ms. Tipton testified falsely at the March 1, 2006, hearing. Instead, dPi witness Tepera concedes that the only support that it has offered for its contention that Ms. Tipton provided false testimony is an inference that dPi contends that the Commission should draw from the data compiled in dPi's exhibits. T p. 70. At this stage of the proceeding, an inference will not do. The burden is on dPi to identify dispositive evidence to prove that BellSouth offered the LCCW promotion to its subscribers because they subscribed to basic service plus the blocking features and that witness Tipton testified falsely when she testified that the promotion was not given for these reasons. dPi has failed to meet its burden and its motion to reconsider should be denied.

The fact of the matter is that dPi, by its own admission, has done nothing more than review the data and compile a set of numbers. From this compilation, dPi discerned that BellSouth granted a high number of waivers. It took no steps, however, to employ an economist/statistician or any other person with expertise in the field to analyze the data to draw statistically relevant conclusions from the data. Nor did it examine any of the orders individually in an attempt to find even one order in which the LCCW waiver was granted to a customer that it contends is eligible to receive the promotion and BellSouth contends is not.

Based upon this record and the testimony here presented, nothing more than mere conjecture supports dPi's contention that the high number of waivers granted during the period in question provides a "strong inference" that BellSouth granted a "significant percentage" of the line connection charge waivers to customers who only ordered basic service and two blocks. Certainly, the evidence in this record is insufficient to prove by the greater weight of the evidence that BellSouth granted <u>any</u>, let alone a significant amount of, LCCW promotional waivers to the customers in question or to prove that Ms. Tipton provided evidence "now known to be false."

Because dPi bears the burden of proving the preceding by the greater weight of the evidence and it has not done so, dPi's November 19, 2007 Motion to Reconsider the Order of June 7, 2006 must be and is, hereby, Denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 18th day of July, 2008.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Lh071808.02