

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by DPI-Teleconnect, L.L.C.  
against BellSouth Telecommunications, Inc.  
for dispute arising under interconnection  
agreement.

DOCKET NO. 050863-TP  
ORDER NO. PSC-07-0787-PHO-TP  
ISSUED: September 27, 2007

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on September 18, 2007, in Tallahassee, Florida, before Commissioner Katrina J. McMurrin, as Prehearing Officer.

APPEARANCES:

CHRISTOPHER MALISH, ESQUIRE, Foster Malish Blair & Cowan, LLP, 1403 West Sixth Street, Austin, Texas 78703  
On behalf of dPi-Teleconnect, LLC (dPi).

JAMES MEZA III, ESQUIRE, and MANUEL A. GURDIAN, ESQUIRE, c/o Gregory R. Follensbee, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301; and J. PHILLIP CARVER, ESQUIRE, AT&T Southeast, Suite 4300, AT&T Midtown Center, 675 W. Peachtree Street, NE, Atlanta, Georgia 30375, and TRACY HATCH, ESQUIRE, 101 North Monroe Street, Suite 700, Tallahassee, FL, 32301  
On behalf of BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T).

LEE ENG TAN, ESQUIRE, and MARY ANNE HELTON, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Florida Public Service Commission (STAFF).

**PREHEARING ORDER**

I. CASE BACKGROUND

On November 10, 2005, this docket was established to address dPi-Teleconnect, L.L.C.'s (dPi) complaint against BellSouth Telecommunications, Inc., d/b/a AT&T Florida (AT&T) for a dispute arising under their interconnection agreement. Pursuant to Order No. PSC-06-0185-PCO-TP, the docket was held in abeyance from March 8, 2006 through January 4, 2007, at which time an Order Granting Motion to Lift Stay (Order No. PSC-07-0015-PCO-TP) was issued. On April 13, 2007, Order No. PSC-07-0322-PCO-TP (Order Establishing Procedure) was issued, scheduling the matter for an administrative hearing on July 11, 2007. On May 11, 2007, dPi and AT&T filed a Joint Motion for Continuance, which was jointly withdrawn on June 13, 2007. By Order No. PSC-07-0571-PCO-TP (Order Modifying Procedure), issued July 9, 2007, the hearing was rescheduled to October 1, 2007. On July 20, 2007, dPi filed a Motion for Continuance, which was denied by Order No. PSC-07-0712-PCO-TP.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 364, Florida Statutes (F.S.). This hearing will be governed by said Chapter and Chapters 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.

IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 119.07(1), F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, F.S.. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit

has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of the Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Each witness will present direct and rebuttal testimony together.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
Brian Bolinger	dPi	1, 2
Steve Watson	dPi	1, 2
Pam Tipton	AT&T	1, 2

VII. BASIC POSITIONS

**dPi:** dPi's basic position is that it was wrongfully denied \$59,210 in credits for the

Line Connection Charge Waiver in violation of federal law.<sup>1</sup>

AT&T created the Line Connection Charge Waiver promotion using the following language, which appeared on its website:

“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.”

AT&T also filed the following language concerning the line connection charge waiver, changing only the number of features needed to qualify for the promotion:

“The line connection charge to reacquisition or winover residential customers who currently are not using BellSouth for local service and who purchase BellSouth Complete Choice service, BellSouth Preferred Pack service, or basic service and *two (2)* features will be waived.”

dPi ordered service for all of its end users with at least basic service plus two or more Touchstar feature blocks. The blocking features are identified by Universal Service Ordering Codes which are listed in AT&T’s tariff amongst the rest of AT&T’s Touchstar features.

dPi submitted requests for credit for each customer that (1) switched its local service to dPi from another provider and (2) purchased basic service with at least two features (3) and did not have dPi service within ten days of the connection request. AT&T denied some of these requests. Because the requests are precisely within the qualifying criteria *drafted by AT&T*, dPi is entitled to the credits.

**AT&T:**

Both issues in this proceeding turn on the question of whether dPi (or, more accurately, dPi’s end users) qualify for credit under three promotions. AT&T Florida makes its retail promotions available to carriers (such as dPi) that resell AT&T Florida’s service, and to the end users of these carriers. However, dPi and its end users must qualify under a standard that is expressly set forth in the Interconnection Agreement between dPi and AT&T Florida. Specifically, “where available for resale, promotions will be made available only to end users who would have qualified for the promotion had it been provided by BellSouth

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<sup>1</sup>This dollar amount comes from AT&T’s response to Staff’s Interrogatory No. 5. AT&T has provided dPi with the raw data to calculate the number itself; however, it was in paper (non-manipulable) format. Thus, dPi has not independently verified this amount. If a subsequent independent verification reveals a large discrepancy, this number will be amended.

directly.” (Interconnection Agreement, Exhibit 1 to Attachment). As to each of the promotions at issue, dPi has failed to meet this standard.

**STAFF:** Staff’s positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff’s final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

#### VIII. ISSUES AND POSITIONS

**ISSUE 1(A): IS dPi ENTITLED TO CREDITS FOR THE AT&T FLORIDA LINE CONNECTION CHARGE WAIVER PROMOTION WHEN DPI ORDERS FREE BLOCKS ON RESALE LINES?**

#### **POSITIONS**

**dPi:** The meaning of the following two excerpts related to the line connection charge waiver promotion is a question of law:

“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.”

and

“The line connection charge to reacquisition or winover residential customers who currently are not using BellSouth for local service and who purchase BellSouth Complete Choice service, BellSouth Preferred Pack service, or basic service and *two (2)* features will be waived.”

The Commission should interpret the language of the promotion based on a plain reading of the text of the promotion and hold that when dPi purchases a package consisting of plain telephone plus two or more Touchstar feature blocks, dPi qualifies for the promotional pricing. AT&T initially interpreted the promotion in this way; it simply chose to change its interpretation of the promotion after it realized that CLECs such as dPi would benefit more from such an interpretation than its own customers, given the nature of the parties’ respective customer bases. Public Policy favoring competition would be supported through the plain reading of the promotion. AT&T, which has created a “promotion credit” system that universally overcharges its CLEC customers and requires the CLECs to hunt down the overcharges and apply for credits, should not be allowed to unjustly

enrich itself at the expense of its competitors by changing its “interpretation” of the promotion in question to avoid paying credits that are due under a plain reading of the promotion. AT&T’s interpretation –which does not follow the plain reading of the promotion—is designed to squelch competition by preventing competitors who manage to navigate the maze of credit requesting from actually receiving the credit in the end.

**AT&T:** No. An end user/customer qualifies for the Line Connection Charge Waiver (“LCCW”) when the end user/customer purchases basic service and two (2) custom calling (or Touchstar service) local features. Free call blocking added by dPi to its end users lines does not qualify for at least three reasons: One, call blocking is not a feature. Instead, call blocking is a service that AT&T makes available to its customers free of charge, which can be used by the customer to block the availability of features (such as call return) on a per call basis. Two, the LCCW promotion requires the customer to purchase local service and two custom calling or Touchstar features. Since call blocks are available free of charge, they cannot be purchased. Therefore, a customer (either an AT&T retailer or dPi end user) cannot qualify for this promotion by selecting call blocks. Three, under the Interconnection Agreement between the parties, AT&T’s obligation is to make promotions that are available to AT&T retail customers equally available to dPi end users. In this instance, however, dPi end users are not attempting to order anything, either a feature or a block. Instead, dPi has placed call blocks on its end users’ lines, and in most if not all cases, has done so without a request from the end user, and without the end user’s consent or knowledge.

**STAFF:** Staff has no position at this time.

**ISSUE 1(B):** IF SO, IN WHAT AMOUNT?

**POSITIONS**

**dPi:** dPi is entitled to \$59,210.

**AT&T:** For the reasons set forth above, dPi is not entitled to any credit.

**STAFF:** Staff has no position at this time.

**ISSUE 2(A):** IS dPi ENTITLED TO ANY OTHER PROMOTIONAL RESALE CREDITS FROM AT&T FLORIDA?

**POSITIONS**

**dPi:** Yes. For over seven months from the time that dPi filed for its promotional credits, AT&T not only failed to credit dPi, but consistently sent dPi collections notices and threatened to embargo dPi from conducting business with AT&T and

ultimately disconnecting dPi's end users. There were three promotions at issue, the Line Connection Charge Waiver, which is detailed in issues 1(A) and 1(B) above, as well as the Secondary Service Charge Waiver and the Two Features for Free promotion. Because AT&T refused to acknowledge any of dPi promotional credit disputes, the company's initial complaint encompassed all outstanding promotional disputes at the time.

Approximately one week after filing its initial complaint, dPi received notification that AT&T would make a lump sum payment to dPi. In an April 8, 2005 email from Gary Patterson, a vice president at AT&T, Mr. Patterson stated:

In summary, the findings are:

\* Secondary Service Charge Waiver - dPi Teleconnect requested \$12,443.78, and received credit of \$12,443.78.

\* 1FR + 2 Free Features - dPi Teleconnect requested \$81,600.72, and received credit of \$81,600.72.

\* Line Connection Waiver - 2004 dPi Teleconnect requested \$594,746.36, and received credit of \$147,443.63. dPi Teleconnect did not receive full credit on all submitted requests due to not meeting end user qualifications of ordering basic local service with 2 custom calling and/or TouchStar(r) features as defined in the Tariff Promotion.

Some of the dPi credit requests for the Secondary Service Charge Waiver and the Free Features promotion were denied however. Additionally, dPi continued to submit for credits under those promotions a small portion of which were denied.

**AT&T:**

No. There are two other promotions at issue in this proceeding. One, Secondary Service Charge Waiver ("SSCW"), which applies only to existing customers. In almost every instance in which dPi failed to qualify, it submitted credit requests for customers that were not existing customers. Two, dPi's request for credit under the two Features for Free Promotion did not qualify for two reasons: 1) Some requests extended beyond the terms of the promotion; 2) dPi also submitted credit requests for existing dPi customers, even though the promotion only applies to new customers.

**STAFF:**

Staff has no position at this time.

**ISSUE 2(B): IF SO, IN WHAT AMOUNT?****POSITIONS**

**dPi:** \$1,922.11 total plus any and all late fees assessed by AT&T. \$1,442.79 for the Secondary Service Charge Waiver plus any and all late fees assessed by AT&T and \$479.32 for the 2 Features for Free promotion plus any and all late fees assessed by AT&T.

**AT&T:** For the reasons set forth above, dPi is not entitled to any credit.

**STAFF:** Staff has no position at this time.

**IX. EXHIBIT LIST**

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
	<u>Direct</u>		
Watson	dPi	<u>(dPi-1)</u>	General subscriber service tariff excerpt pertaining to Touchstar service rates and charges.
Watson	dPi	<u>(dPi-2)</u>	General subscriber service tariff excerpt pertaining to special promotions offered by BellSouth.
Watson	dPi	<u>(dPi-3)</u>	Screenshot taken from AT&T's website during the summer of 2005 indicating promotion criteria for Line Connection Charge Waiver promotion.
Watson	dPi	<u>(dPi-4)</u>	Spreadsheet which shows the Line Connection Charge Waiver promotion credits that dPi applied for, and those that were paid.
Bolinger	dPi	<u>(dPi-5)</u>	Examples of dPi-AT&T email correspondence on the subject of the promotion credit payment
Tipton	AT&T	<u>(PAT-1)</u>	Exhibit A to Part 1 of the Interconnection Agreement between AT&T Florida and dPi.



<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Tipton	AT&T	<u>(PAT-2)</u>	AT&T Florida Tariff (GSST, Section A.2.10(A)) which describes the promotions at issue in this proceeding.
Tipton	AT&T	<u>(PAT-3)</u>	Examples of Accounts for which dPi submitted Promotional credit requests.
Tipton	AT&T	<u>(PAT-4)</u>	Order of the North Carolina Utilities Commission.
Tipton	AT&T	<u>(PAT-5)</u>	AT&T Florida Tariff (G.S.S.T., Section A.13.19.4), which relates to rates and charges for TouchStar services.

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

dPi's Motion to Strike Testimony of Pam Tipton, filed on September 17, 2007.

XII. PENDING CONFIDENTIALITY MATTERS

AT&T's Request for Specified Confidential Classification for its Responses to dPi's Request for Information Nos. 1-16, and 1-22 (DN 07025-07), filed on September 10, 2007.

XIII. POST-HEARING PROCEDURES

If no bench decision is made, each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of this Prehearing Order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 25 pages and shall be filed at the same time.

XIV. RULINGS

1. dPi-Teleconnect L.L.C.'s Motion for Leave to File Amended Testimony, filed on July 23, 2007:

This motion is granted.

2. dPi-Teleconnect L.L.C.'s Motion for Leave to File Amended Testimony, filed on September 14, 2007:

This motion is rendered moot based upon the understanding by the parties that dPi shall provide a red-lined copy of the amended testimony whereupon AT&T shall have an opportunity to file supplemental rebuttal testimony to be filed no later than close of business, Tuesday, September 25, 2007.

3. dPi-Teleconnect L.L.C.'s Motion to Compel, filed on September 13, 2007:

The scope of discovery under the Florida Rules of Civil Procedures is liberal. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party . . .

This standard is not, however, without limit. Objections to discovery that are "burdensome or overly broad," must be quantified. First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc., 545 So. 2d 502, 503 (Fla. 4<sup>th</sup> DCA 1989). It is necessary to explain why the request is burdensome. At the prehearing, AT&T explained that the process of manually retrieving the information from the backup archive database is "virtually impossible," or at the very least would take "hundreds, perhaps thousands of hours and maybe couldn't be done at all."

AT&T asserted that it can provide the information from July 2005 through July 2007, as currently available on the billing system. Given the difficulty and burden that production of the entire 2002 through 2007 time frame initially requested by dPi would present to AT&T, AT&T shall provide the requested information for the period of July 2005 through July 2007, in a sampling format to be determined by AT&T.

Accordingly, dPi's Motion to Compel is denied in part and granted in part. AT&T shall provide this information to dPi and staff electronically by close of business,

Wednesday, September 26, 2007. The parties are strongly encouraged to work towards an equitable resolution regarding the remaining data in dispute.

4. AT&T's Motion to Compel, filed September on 17, 2007:

The scope of discovery under the Florida Rules of Civil Procedures is liberal. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. . .

Applying the above standard, and upon consideration of the arguments set forth by the parties, the information AT&T seeks is relevant to the subject matter of the issues in this proceeding. The information sought appears reasonably calculated to lead to the discovery of admissible evidence. Specifically, the discovery requests at issue appear to seek information that can be used to argue whether the promotion was applied equally by dPi and AT&T.

Accordingly, AT&T's Motion to Compel is granted in its entirety. dPi shall provide this information to AT&T and staff electronically by close of business, Wednesday, September 26, 2007.

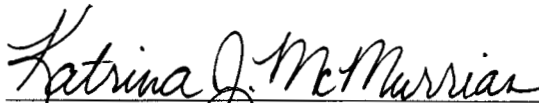
5. Opening statements:

Opening statements shall not exceed fifteen minutes per party.

It is therefore,

ORDERED by Commissioner Katrina J. McMurrian, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 27th  
day of September, 2007.

  
KATRINA J. McMURRIAN  
Commissioner and Prehearing Officer

( S E A L )

TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.