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November 20, 2009

BY HAND DELIVERY
Ms. Ann Cole
Commission Clerk
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 090258-TP

Dear Ms. Cole:

Enclosed for filing on behalf of dPi Teleconnect, LLC is an original and fifteen copies of the Direct Testimony of Tom O'Roark on behalf of dPi Teleconnect, LLC in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Robert A. Horton, For

Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: Chris Malish, Esq.
Parties of Record

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by electronic mail (*) and/or U.S. Mail this 20th day of November, 2009.

Lee Eng Tan, Esq.*
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Mr. Thomas G. O'Roark
dPi Teleconnect, LLC
2997 LBJ Freeway, Suite 225
Dallas, TX 75234-7627

Manuel A. Gurdian, Jr., Esq.*
c/o Mr. Gregory Follensbee
AT&T Florida Inc.
150 South Monroe Street, Suite 400
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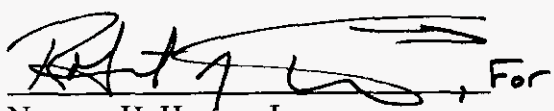

Norman H. Horton, Jr.

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by dPi Teleconnect, LLC against BellSouth Telecommunications, Inc. d/b/a AT&T Florida for dispute arising under interconnection agreement.	)))))	Docket No. 090258-TP

REBUTTAL TESTIMONY OF TOM O'ROARK

Q. Mr. O'Roark, have you reviewed BellSouth's direct testimony?

A: I have.

Q: Overall, what is your response to BellSouth's testimony?

A: Generally, BellSouth's testimony is anticipated and countered in my direct testimony. However, there are few ideas that have come up that bear addressing – including BellSouth's contention that it is not required to provide the cash back offers to dPi because they are not telecommunications services, and that allowing AT&T to discriminate by making offers available to its retail customer but not to CLECs like dPi does not harm competition.

Q: What is your response to BellSouth's contention that it need not offer the cash back promotions to CLECs like dPi because they are not telecommunications services?

A. This is a classic case of misstating the problem. The question is not whether the promotions are telecommunications services – the question is whether the promotions affect ***the rate*** at which the services are provided.[1] These cash back

[1] 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to "offer for resale at ***wholesale rates*** any telecommunications service that the carrier provides at retail to subscribers who are

promotion offers, whether in the form of rebates on a bill or actual checks sent to consumers, have the obvious effect of offering to reduce the net amount spent by the consumer on telephone service. The fact that the customer might initially be billed one amount and the next day credited or paid back with a check doesn't change the fact that the net amount of the overall retail offer is much less than the tariffed rate. Allowing AT&T to shift their customers to this kind of non-standard offering and thereby circumvent AT&T's obligation to resell their services at wholesale is precisely the kind of activity that the FCC warned eviscerates the resale provisions of the FTA.[2]

Q: What is your response to BellSouth's contention that its refusal to extend the cash back offers it makes its retail customers to resellers is reasonable and non-discriminatory?

A. This contention is disingenuous at best. The FCC has given some guidance for the kind of restrictions that are reasonable and permitted. 47 CFR. § 51.613, relating to restrictions on resale provides an example of the kinds of promotion

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not telecommunications carriers."

[2] The FCC found that the resale requirement of Section 251(c)(4) of the Act:

> ***makes no exception for promotional or discounted offerings***, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted)(emphasis added)

restrictions that are reasonable and non-discriminatory, such as cross-class selling, in which an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the promotion only to a certain class of customers eligible for the promotion – *i.e.*, if the ILEC's promotion is directed to *residential* customers, the CLEC cannot cross sell it to *business* class customers. This kind of discrimination is not at all similar; in this case AT&T is refusing to extend offers to CLECs where the CLEC's order is essentially identical to AT&T's retail customer's order.

Q. What is your response to BellSouth's contention that competition is not harmed when AT&T does not make the cash back promotions available to CLECs like dPi?

A. I find it absolutely astonishing that AT&T makes such claims. Among other things, AT&T appears to be claiming that its discriminatory actions are good for competition, and that its actions have had no effect adverse effect on competition, citing as evidence:

(1) the fact that the amounts involved are so small;

(2) the fact that dPi is still in business; and

(3) the fact that other CLECs have not complained as dPi has done.

First, the point behind the FTA was to help dismantle the monopoly in local phone service enjoyed by BellSouth and the other ILECs by promoting competition with the ILECs by new entrants – not to promote the monopolist *BellSouth*'s ability to compete against new entrants. It is a perversion of this purpose to hold that

BellSouth can reduce the effective retail rate of its services for its retail customers and not correspondingly decrease the rate for its wholesale customers. Widening the price point between AT&T's pricing and CLECs' pricing makes already difficult competition that much more difficult. Allowing this outcome would enable AT&T to further *gain* market share and *reduce* competition, the antithesis of what the Act is designed to do.

I'm sure this Commission is well aware that wireline competition in Florida is not robust, vibrant, or even healthy. The line count that CLECs have is minuscule compared to BellSouth's and is not growing. All the former chief wireline competitors have been crushed: AT&T, once an independent competitor, has been consumed by BellSouth/AT&T; MCI is likewise long gone.

Second, all the things AT&T is citing as evidence that its discriminatory treatment with regards to these promotions did not harm competition are in fact evidence to the contrary:

(1) the fact that the amount in controversy is so low is because dPi had trouble attracting enough customers that might otherwise qualify for the promotions – there is simply no way for dPi to compete with AT&T when AT&T's effective retail rate is so much higher than the wholesale price dPi is charged for the same service;

(2) the fact that dPi is still alive does not mean that dPi is successful or that competition is flourishing: dPi has in fact had difficulty growing its line count and is lucky to be alive at all; the fact that dPi limps along despite its wounds does not

mean that it is "successful." dPi's line count is infinitesimal as compared to BellSouth's in Florida and can hardly be called an example of "success."

(3) the fact that now that the old independent AT&T and MCI are gone and the remaining small CLECs no longer have the resources to engage in unlimited litigation with AT&T is not a measure of the CLECs' successful competition, but an indication that in more than 10 years of nearly non-stop litigation by the ILECs since the Act was passed, the ILECs have managed to bleed the competition dry. Allowing AT&T to get away with offering its services at retail at an effective rate lower than the wholesale rate is a sure recipe for the eventual elimination of wireline competition entirely.

Q. What is your response to AT&T's claim that dPi's claims were made late under the contract?

A. Mr. Ferguson seems to suggest that claims that were filed more than 12 months after they arose are barred by the contract. But this is true only for claims that arose under the *second* contract – the one dated April 2007 and in effect from May 2007 to the present. The second contract that went into effect May 2007 does have a 12 month limitations period in it. However, this second contract specifically provides that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date." General Terms and Conditions sec. 2.1.[3]

[3] The second agreement does have a merger clause at section 30.1 that provides that orders placed under the prior agreement but not filled until the effective date of the new agreement, and services commenced under prior agreements but provided under the new

The "Effective Date is defined as the date that the Agreement is effective for purposes of rates, terms, and conditions and shall be 30 days after the [April 2007] date of the last signature executing the Agreement." General Terms and Conditions, Definitions (p. 2).

Accordingly, dPi's claims that arose while the old contract was in effect are governed by the old contract, in which the limitations period is six years. So, claims from prior to April 2007 were in fact timely filed.

Furthermore, neither version of the contracts themselves provide for specific forms to be used in disputing bills or escalating disputes; AT&T cannot arbitrarily impose its own conditions on what form is "acceptable" for billing after the contract has been signed. The requests for credits were submitted on AT&T's "BAR" (Billing Adjustment Request) forms, and when not paid, the matter was escalated by dPi's Brian Bolinger discussing the matter with AT&T's Pam Tipton.

Q. Does this conclude your direct testimony?

A. Yes, it does for now. But I reserve the right to make changes as necessary.

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agreement would be governed by the new agreement going forward. However, this provision does not apply to orders and service completed under the old contract. In any event, dPi's claims were made within 12 months of the new agreement going into effect.