

Ruth Nettles

090258-TP

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Friday, December 04, 2009 3:00 PM
To: Filings@psc.state.fl.us
Subject: 090258-TP AT&T Florida's Motion to Compel
Importance: High
Attachments: LEGAL-#748013-v1-090258-TP_ATT_motion_to_compel_dpi_responses_to_discovery.DOC; Untitled.pdf

A. Vickie Woods
 Legal Secretary to E. Earl Edenfield, Jr., Tracy W. Hatch,
 and Manuel A. Gurdian,

BellSouth Telecommunications, Inc. d/b/a AT&T Florida
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B. Docket No. : 090258-TP
 Complaint of dPi Teleconnect, L.L.C. with BellSouth Telecommunications,
 Ind. d/b/a AT&T Florida regarding BellSouth's failure to extend Cash
 Back promotions to dPi

C. AT&T Florida
 on behalf of Manuel A. Gurdian

D. 59 pages total in PDF format (includes letter, certificate, pleading and Exhibits A thru E)
 13 pages total in .word format

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Compel

.word doc.

.pdf

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December 4, 2009

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. 090258-TP: Complaint of dPi Teleconnect, L.L.C. against
BellSouth Telecommunications, Inc. d/b/a AT&T Florida for dispute
arising under interconnection agreement**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Compel, 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
Jerry Hendrix
Gregory R. Follensbee
E. Earl Edenfield, Jr.

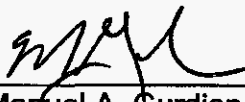
CERTIFICATE OF SERVICE
Docket No. 090258-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 4th day of December, 2009 to the following:

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Manuel A. Gurdian

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: dPi Teleconnect, L.L.C. v.) Docket No. 090258-TP
BellSouth Telecommunications, Inc.)
_____) Filed: December 4, 2009

AT&T FLORIDA'S MOTION TO COMPEL

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T"), submits this Motion to Compel dPi Teleconnect, LLC ("dPi") to respond to AT&T's First Set of Interrogatories Nos. 7a, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, and 22, and First Request for Admissions No. 4, and Second Set of Interrogatories, Nos. 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 42 and Second Set of Requests for Production of Documents Nos. 10, 11 and 12. dPi has refused to answer most of these requests on the basis of identically worded "relevancy" objections, which are unfounded. dPi has committed to answer the remaining requests (noting simply "will supplement" in response to each), but to date no response has been received. For the following reasons, the Florida Public Service Commission ("Commission") should compel dPi to respond to AT&T's discovery.

I. Overview of Discovery Dispute Issues: Relevancy and Failure to Provide Timely Response

A. Relevancy

On May 1, 2009, dPi filed this action before the Commission against AT&T alleging that it should provide credits to dPi in connection with three "cash-back" promotions. dPi alleges that AT&T was obligated to provide these credits on the basis of federal resale requirements and that AT&T's refusal to provide the credits is "unreasonable" or "discriminatory".¹ In addition to the allegations and legal citation in the complaint, dPi has filed testimony regarding the manner

¹ See, for example, dPi's Complaint at page 2, paragraph 6(b) in which dPi cites 47 USC 251(c)(4)(B) for the requirement that AT&T cannot impose unreasonable or discriminatory conditions upon resale.

in which AT&T and dPi price their services to customers, stating that AT&T's practices result in AT&T's retail customer obtaining service at a price "far less than the wholesale amount" on which dPi must base its prices as a reseller.

AT&T has raised several defenses, including the contention that restricting resale in this manner was "reasonable" and "nondiscriminatory", as permitted by the very resale rules cited by dPi in its complaint and testimony. AT&T's defense is supported by the facts regarding the manner in which dPi offers these promotional marketing incentives to its own customers and whether AT&T and dPi compete for the same customers using price to distinguish their offerings. These facts, if discovered, will tend to support AT&T's defense (that the restrictions are reasonable and nondiscriminatory) and will tend to undermine dPi's assertion that the restriction is unreasonable and discriminatory.

Because of the provisions of federal law cited above and relied upon by dPi in this case, the issue of whether AT&T's actions are reasonable and nondiscriminatory are clearly encompassed by issue 2(a) of the issues listed in this docket: *Is dPi entitled to credits from AT&T for the three promotions, Cash Back \$100 Two Features (C2TF), Cash Back \$100 Discount Complete choicer, and the Cash Back \$50 2 Pack Plan?*

In a regulatory docket considering the resale of promotions, the North Carolina Utilities Commission ("North Carolina Commission") provided guidance as to how it will evaluate restrictions on resale of cash back promotions. There, the North Carolina Commission explained that "[g]iven that there has been no opposition to gift card type promotions from the reseller community,² the Commission is reluctant to establish a rule that the benefit of these promotions

² Similarly, no reseller other than dPi has filed a Complaint with the Florida Commission claiming that it is owed cashback promotional credits regarding services it purchased for resale prior to June 2007.

must be offered to resellers in addition to the reseller discount.”³ Instead, the North Carolina Commission decided that “upon proof that it is reasonable and nondiscriminatory not to offer the benefit of a promotion offered for more than 90 days to resellers, the ILECs will not be required to provide such benefit to resellers in addition to the established reseller wholesale discount.”⁴

The North Carolina Commission then discussed some (but by no means all) of the factors an ILEC “may present to establish that a restriction [on resale] is reasonable and nondiscriminatory...”⁵ One such factor is whether competition will be “stifled or unduly harmed.”⁶ Another is the extent to which a reseller offers promotional inducements that are different than the inducements offered by the ILEC.⁷

dPi’s current prices, terms, and conditions for its services in Florida are particularly relevant in determining whether the restriction at issue in this proceeding is reasonable and nondiscriminatory. In the North Carolina Resale Promotion docket, the North Carolina Commission stated:

The resale obligation of TA 96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to end users, so it *possible* that a reseller would choose not to pass the promotional rate on to its customers. However, the Commission believes such an outcome is

³ See Order Ruling on Motion Regarding Promotions, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* Docket No. P-100, Sub 72b at p. 12 (December 22, 2004)(emphasis in original).

⁴ *Id.* at 13.

⁵ In its subsequent Order clarifying its ruling, the North Carolina Commission explained that its “discussion of factors an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive...” See Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* Docket No. P-100, Sub 72b at 3 (June 3, 2005).

⁶ See Order Ruling on Motion Regarding Promotions at 12.

⁷ See *Id.* at 12 (“Moreover, after purchasing services from the ILECs at the wholesale discount rate (a rate made possible by excluding ILEC marketing costs from the resale price), resellers may resell these services to end-users and may offer promotional inducements at their own expense whether or not the ILECs offer such promotions.”).

unlikely because a reseller's success is based on being able to sell services at prices that are competitive with the ILEC's prices in the marketplace."⁸

The information sought by AT&T Florida is relevant because it will prove that dPi is doing exactly what the North Carolina Commission suspected would be "unlikely."

On November 17, 2009, the North Carolina Commission confirmed the relevance of this line of questioning when it overruled dPi's relevance objection to those questions at a hearing on the very issues in this case. At that hearing, Commissioner Culpepper ruled that the questions about dPi's prices and terms could be asked.⁹ The North Carolina Commission has not yet ruled upon a similar motion to compel filed in that case, but the ruling on the live cross-examination was made after the parties had presented oral argument on that motion, specifically addressing the relevance issue, earlier on November 17, 2009.¹⁰

Finally, recent activity in the companion proceedings dPi brought before the South Carolina and Georgia Commissions demonstrates the relevance of these Interrogatories and the futility of dPi's objections. In June, the South Carolina Commission ordered dPi to produce information on how dPi prices its retail services.¹¹ More recently, because of the nominal amounts dPi sought in that docket, dPi and AT&T Georgia agreed to waive a hearing and submit the case to the Georgia Commission on the basis of pre-filed testimony and exhibits. Significantly, AT&T Georgia's testimony and exhibits (to which dPi did not object) include the same type of information about the prices, terms and conditions of dPi's services in Georgia as AT&T Florida is seeking in the Interrogatories to which dPi now objects. Additionally, the Staff

⁸ See Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay at 7 (emphasis added).

⁹ See Transcript, Docket No. P-55, Sub 1744, *In the Matter of BellSouth Telecommunications, Inc.: Complaint of dPi Teleconnect, LLC*, November 12, 2009, at pp. 79-81, attached hereto as Exhibit "C".

¹⁰ *Id.* at pp. 10-19, attached hereto as Exhibit "D".

¹¹ A copy of the South Carolina Commission's Order is attached hereto as Exhibit "E".

of the Georgia Commission implicitly recognized the relevance of this type of information when it recently served dPi with the following discovery request:

- (a) Since June, 2007, has dPi reduced its price for basic local service in Georgia as a result of receiving the “cash back” promotional credit; and
- (b) Please state the prices that dPi charged for basic local service in Georgia for each month from January 2007 through the present.

These requests, just like the AT&T discovery requests at issue in this motion, are designed to elicit information relevant to the determination of whether AT&T imposed resale restrictions that are reasonable and nondiscriminatory – and thus permitted by federal law.

dPi concedes in its discovery responses that, under Florida law, a discovery request is appropriate when it is reasonably likely to lead to the discovery of relevant evidence. Moreover, the Commission has recognized that the scope of discovery under the Florida Rules of Civil Procedure is liberal. *See In re: Complaint by DPI-Teleconnect, LLC against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement*, Docket No. 050863-TP, Order No. PSC-07-0787-PHO-TP at p. 11, (Issued September 27, 2007). Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that:

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 defenses of any other party.

Evidence is relevant when it tends to make more or less likely the facts at issue in the case. For the reasons set forth above, the manner in which dPi prices its service and offers service to its end users is relevant to whether or not AT&T’s actions constitute a reasonable and nondiscriminatory restriction on resale, consistent with the federal statutes upon which dPi relies.

B. Failure to Timely Respond or Supplement

dPi's discovery responses were due, pursuant to the scheduling order in this case, twenty (20) calendar days from receipt (on or about October 19 for the first set of discovery, and on or about October 28 for the second set). While AT&T recognizes that circumstances may sometimes require additional time, dPi's open-ended intention to supplement lacks any reference to when such supplemental responses will be provided. No such supplements have yet been received even though dPi first assured AT&T that it "will supplement" more than six weeks ago for the first set of discovery and nearly that long ago for the second. dPi is not entitled to ignore the requirements and deadlines of the procedural order in this case, and AT&T cannot prepare its defense if such responses are not timely provided. Based on experience in other states and given that dPi has taken no steps to supplement its answers as it promised to do in October, AT&T respectfully suggests that a Commission-ordered deadline for dPi to provide these supplements is now needed.

II. Discussion of Specific Discovery Requests

dPi has failed to provide any response (other than the reference "will supplement") to AT&T Florida's First Set of Interrogatories Nos. 7a, 17, 18, 19 and Second Set of Interrogatories Nos. 31, 39, 40, and 41 and Second Set of Requests for Production of Documents Nos. 10 and 11. As noted above, AT&T requests that the Commission establish a deadline of January 5, 2010, for dPi to provide the responses.

dPi objects, on the relevancy basis described above, to responding to AT&T's First Set of Interrogatories Nos. 9, 10, 11, 13, 14, 15, 16, 20, and 22, and First Request for Admissions No. 4, and Second Set of Interrogatories, Nos. 32, 33, 34, 35, 36, 37, 38, and 42 and Second Set of

Requests for Production of Documents No. 12. *See* dPi's Response to AT&T Florida's Request for Admissions and dPi's Response to AT&T Florida's First Set of Interrogatories attached hereto as Exhibits "A" and "B".

As noted above, each of these requests seeks relevant information because both dPi's allegations and its legal arguments as well as AT&T's defenses and legal arguments relate to each of these requests. The relevance of each separate request is discussed below:

First Set of Interrogatories

9. Of the Promotional requests at issue in this proceeding, did dPi submit any request to AT&T Florida in response to a dPi end user request for a cash back promotional credit?

a. If you answered Interrogatory 9 affirmatively, identify all documents that memorialize all such requests by a dPi end user or that otherwise support your response to Interrogatory 9.

RELEVANCE: This request relates to whether or not AT&T's restriction was unreasonable because it elicits information regarding whether or not dPi was unable to compete for particular customers without the use of the cash-back promotion. If dPi's customers selected dPi without regard to whether dPi offered such a promotion, then that fact would tend to show that the restriction did not result in the inability of dPi to compete and win customers.

10. When dPi receives a cash back promotional discount on wholesale services purchased from AT&T, how much (if any) of the promotional discount does dPi pass on to its end users?

RELEVANCE: This request also relates to the reasonableness of AT&T's restriction. If dPi does not reduce the retail price at which it offers its service to retail customers, then AT&T's restriction does not have any impact on the price those retail customers pay dPi for service.

Consequently, the restriction would have no impact on the ability to compete with AT&T based upon price. In addition, if dPi chooses not to pass on the full amount of the promotional discount to its end users, then that fact supports the argument AT&T has advanced that dPi does not compete based upon price and, instead, targets customers who cannot obtain service from AT&T because of their credit status. These facts would all tend to support AT&T's contention that its restriction was reasonable and undermine dPi's allegation that the restriction was unreasonable.

11. **Please explain the process by which dPi passes amounts described in Interrogatory 10 to its end users and identify all documents that memorialize such process.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10.

13. **If you answered Interrogatory 12 in the affirmative, did dPi pass the promotional discount on to its end users?**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

14. **If you answered Interrogatory 13 in the affirmative, please identify all documents that demonstrate that dPi passed the promotional discount on to its end users.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

15. **Identify every action in the ordering process by which the dPi end user specifically orders (or requests) a cash back promotion.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

- 16. Does the dPi ordering process include any requirement for its sales representatives to offer a cash back promotion to its customers?**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

- 20. If successful in this proceeding, does dPi intend to pass on to its end users the promotional discounts dPi may be awarded in this proceeding?**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

- 22. Did dPi offer its end users the ability to receive a cashback promotion in exchange for initiating service in Florida from December 2003 to June 2007?**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10.

First Request for Admissions

- 4. Admit that dPi charges its end users for basic local service in Florida more than 200% the amount it pays to AT&T for the purchase of these services on a discounted, wholesale basis.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10.

Second Set of Interrogatories

32. **Attachment A to this set of requests is a document that was obtained from dPi's website with regard to the Miami, Florida area. Please identify any inaccuracies in the information set forth in Attachment A and provide all information necessary to fully correct each inaccuracy you identify.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10. In addition, any inaccuracies identified would be relevant to the credibility of dPi.

33. **The first page of Attachment A to this set of requests include, under the "Quote" heading, an "Upgrade" that reads, "The dPi Club Program (1st month free)." AT&T Florida's understanding is that when a Customer uses this website to order dPi residential service from dPi, unless the customer clicks the "remove" link associated with that entry, the Customer receives "The dPi Club Program" and incurs a charge of \$3.00 per month with the exception of month one. Please confirm that AT&T Florida's understanding is accurate or, to the extent it is inaccurate, please provide all information necessary to fully correct any such inaccuracy.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10. Moreover, this request seeks information relevant to whether dPi is offering its own incentives or "promotional inducements", an issue specifically highlighted by the North Carolina Commission in its order on resale promotions.¹²

34. **Referring to Attachment A, please state the amount of the service activation charge and/or the customer activation fee dPi would charge a residential customer in Miami, Florida if the Line Connection Charge Waiver Promotion was not available.**

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10.

¹² See Order Ruling on Motion Regarding Promotions, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* Docket No. P-100, Sub 72b at p. 13 (December 22, 2004).

35. With regard to Attachment A, please explain what the \$60.00 "Service Activation Charge" is and how Dpi determined the amount of that charge.

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

36. With regard to Attachment A, please explain what the \$1.69 "USOC Order Charge" is and how dPi determined the amount of that charge.

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10

37. With regard to Attachment A, please explain what "Payment Deferral" is and how dPi determined the amount indicated.

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10.

38. Attachment B to this set of requests was obtained from dPi's website with regard to the Miami, Florida area. Please identify any inaccuracies in the information set forth in Attachment B and provide all information necessary to fully correct each inaccuracy you identify.

RELEVANCE: This request is relevant for the same reasons discussed in relation to requests number 9 and 10. In addition, any inaccuracies identified would be relevant to the credibility of dPi.

42. Please provide the answer to the following question on Page 141 of the August 25, 2009 deposition of Thomas O'Roark taken in North Carolina Utilities Commission Case No. P 55, Sub 1744: "And my question was, when

that claim was denied and not paid, when did dPi first come to AT&T and say, We dispute the denial, and we're going to escalate?"

RELEVANCE: This request is relevant to AT&T's defense that dPi did not comply with the requirements for dispute resolution in its interconnection agreement. This is encompassed by Issue 1 in the Issues list established in this docket regarding whether the claims dPi has made are time barred.

Second Request for Production of Documents

12. Please produce all documents that support your response to Interrogatory No. 42.

RELEVANCE: This request is relevant to AT&T's defense that dPi did not comply with the requirements for dispute resolution in its interconnection agreement. This is encompassed by Issue 1 in the Issues list established in this docket regarding whether the claims dPi has made are time barred.

III. Conclusion

AT&T Florida is in need of the information requested in the above-referenced discovery to properly prepare its case for hearing and respectfully requests that the Commission grant its Motion to Compel.

Pursuant to Rule 28-106.204(3), AT&T contacted dPi in an attempt to resolve the issues raised in this Motion; however, dPi did not respond to AT&T.

Respectfully submitted this 4th day of December, 2009.

AT&T FLORIDA



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090258-TP (dPi)
AT&T Florida's Motion to Compel
Exhibit A

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

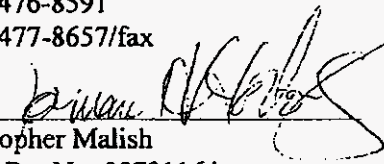
In the Matter of)	
)	
dPi Teleconnect, L.L.C.)	
)	Docket No. 090258-TP
v.)	
)	
BellSouth Telecommunications, Inc.)	

**DPI TELECONNECT'S RESPONSE TO AT&T FLORIDA'S
FIRST REQUEST FOR ADMISSIONS**

Pursuant to the *Order Establishing Procedure* ("Order") issued by the Florida Public Service Commission (the "Commission") on July 15, 2009, dPi Teleconnect, L.L.C. ("dPi") hereby serves BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") with its Response to AT&T Florida's First Request for Admissions.

Respectfully submitted,

Malish, & Cowan, P.L.L.C.
1403 West Sixth Street
Austin, Texas 78703
(512) 476-8591
(512) 477-8657/fax

By: 
Christopher Malish
Texas Bar No. 00791164
Attorneys for Complainant

FIRST REQUEST FOR ADMISSIONS

- 1. Admit that dPi has a contract with Lost Key under which Lost Key submits promotion credit requests on behalf of dPi.**

ANSWER:

Admitted

- 2. Admit that all credit requests that are at issue in this proceeding were submitted on behalf of dPi by Lost Key.**

ANSWER:

Admitted

- 3. Admit that under the terms of the contract between Lost Key and dPi, Lost Key receives a commission for every promotional credit that dPi receives from AT&T.**

ANSWER:

Admitted

- 4. Admit that dPi charges its end users for basic local service in Florida more than 200% the amount it pays to AT&T for the purchase of these services on a discounted, wholesale basis.**

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations

with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates

(e) Except as provided in §51.613 [relating to cross-class selling and short term promotions], *an incumbent LEC shall not impose restrictions on the resale* by a requesting carrier of telecommunications services offered by the incumbent LEC.

47 C.F.R. § 51.613 Restrictions on resale.

(a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:

(1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the 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.]

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

Furthermore, the parties' contract concedes that:

- a. the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" General Terms and Conditions ("GTC") p.1;

- b. "... this agreement *shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC...*" GTC p. 15.
- c. "...*Subject to effective and applicable FCC and Commission rules and orders, BellSouth shall make available to dPi for resale those telecommunications services BellSouth makes available...to customers who are not telecommunications carriers.*" Resale Attachment's General Provision sections 3.1, p. 3
- d. "When dPi purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be be ... subject to the same conditions... that BellSouth provides to its ...End Users." General Terms and Conditions ("GTC") p. 4;

Accordingly, the only information relevant to determining whether AT&T has met its obligations under the FTA and FCC's rules is (1) the terms and conditions under which AT&T makes certain offers to its retail customers; and (2) whether it makes the same offers available to resellers, like dPi.

However, the information sought by AT&T is information not related to the terms and conditions under which AT&T provides service to its retail customers, or to whether AT&T makes its retail offers available to resellers. Instead, AT&T seeks information about *dPi's interactions with third parties* – dPi's customers, which is utterly irrelevant and inadmissible in this case.

Again, the ONLY question before this tribunal is whether is *AT&T* is required to extend promotional pricing for which *AT&T's retail* customers qualify to *dPi* as a wholesaler. As a matter of law, the sole areas of appropriate inquiry in this case are: (1) the meaning and construction of the promotion at issue; and (2) AT&T's past practices in making the promotion pricing available to its retail and other wholesale customers. Inquiries into *dPi's* relations with *third parties* – e.g., whether dPi passes on all or some of the promotional savings to its customers – have absolutely no bearing on the questions this tribunal must answer and are nothing more than a sideshow and a diversion.

Here, because it is utterly irrelevant, the probative value of the information requested is zero, and thus the burden of producing the material obviously exceeds the zero probative value of the information requested.

5. Admit that dPi resells AT&T's services in Florida pursuant to the Resale provisions of the Interconnection Agreement between the parties.

ANSWER:

Admitted

- 6. Admit that in the State of Florida, dPi provides only pre-paid telecommunications services.**

ANSWER:

Admitted

- 7. Admit that dPi serves only residential customers in the State of Florida.**

ANSWER:

Denied; dPi's customer base is almost entirely residential, but dPi is authorized to serve businesses and corporations as well.

- 8. Admit that dPi does not own any telecommunications facilities in the State of Florida.**

ANSWER:

Admitted

090258-TP (dPi)
AT&T Florida's Motion to Compel
Exhibit B

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

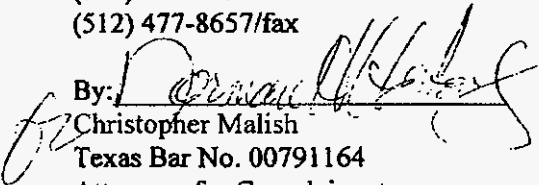
In the Matter of)	
)	
dPi Teleconnect, L.L.C.)	
)	Docket No. 090258-TP
v.)	
)	
BellSouth Telecommunications, Inc.)	

**DPI TELECONNECT'S RESPONSE TO AT&T FLORIDA'S
FIRST SET OF INTERROGATORIES**

Pursuant to the *Order Establishing Procedure* ("Order") issued by the Florida Public Service Commission (the "Commission") on July 15, 2009, dPi Teleconnect, L.L.C. ("dPi") hereby serves BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") with its Response to AT&T Florida's First Set of Interrogatories.

Respectfully submitted,

Malish, & Cowan, P.L.L.C.
1403 West Sixth Street
Austin, Texas 78703
(512) 476-8591
(512) 477-8657/fax

By: 
Christopher Malish
Texas Bar No. 00791164
Attorneys for Complainant

FIRST SET OF INTERROGATORIES

1. Please identify all documents which support the contention that "[i]n Florida, dPi qualified and applied for, approximately \$27,250 in cash back promotions." (Complaint, ¶ 11).

ANSWER:

Please see the documents attached within the First Request for Production of Documents.

2. For the cashback promotions that dPi contends it is entitled to in Florida (approximately \$27,250), please identify the dollar amount associated with each of the three promotions identified in footnote 1 of dPi's Complaint.

ANSWER:

\$100 Complete Choice Cash Back offer -- \$5,500
\$100 1FR + 2 Cash Back offer -- \$8,900
\$50 1FR + 2 Cash Back offer -- \$12,850

3. If dPi contends that it is entitled to any cashback promotions other than the three promotions identified in footnote 1 of dPi's Complaint, please specifically identify each such promotion, state the amount dPi contends it is entitled to for each such promotion, and identify all documents that support such amounts.

ANSWER:

Not Applicable

4. Please identify all documents which support the contention that "[a]cross the 9-state BellSouth region, the total figure that dPi qualified and applied for, but was not paid, is \$465,950 in cashback promotion credits." (Complaint, ¶ 11).

ANSWER:

Please see the documents attached within the First Request for Production of Documents.

5. For the cashback promotions that dPi contends it is entitled to in the former BellSouth

region (approximately \$465,950), please identify, by State, the dollar amount associated with each of the three promotions identified in footnote 1 of dPi's Complaint.

ANSWER:

ALABAMA

\$100 Complete Choice Cash Back offer -- \$5,500

\$100 1FR + 2 Cash Back offer -- \$8,900

\$50 1FR + 2 Cash Back offer -- \$12,850

MISSOURI

\$100 Complete Choice Cash Back offer -- \$3,050

\$100 1FR + 2 Cash Back offer -- \$3,200

\$50 1FR + 2 Cash Back offer -- \$0

FLORIDA

\$100 Complete Choice Cash Back offer -- \$5,500

\$100 1FR + 2 Cash Back offer -- \$8,900

\$50 1FR + 2 Cash Back offer -- \$12,850

LOUISIANA

\$100 Complete Choice Cash Back offer -- \$7,300

\$100 1FR + 2 Cash Back offer -- \$500

\$50 1FR + 2 Cash Back offer -- \$19,000

KENTUCKY

\$100 Complete Choice Cash Back offer -- \$25,250

\$100 1FR + 2 Cash Back offer -- \$2,600

\$50 1FR + 2 Cash Back offer -- \$9,200

TENNESSEE

\$100 Complete Choice Cash Back offer -- \$69,150

\$100 1FR + 2 Cash Back offer -- \$9,800

\$50 1FR + 2 Cash Back offer -- \$17,200

NORTH CAROLINA

\$100 Complete Choice Cash Back offer -- \$36,900

\$100 1FR + 2 Cash Back offer -- \$35,900

\$50 1FR + 2 Cash Back offer -- \$83,700

GEORGIA

\$100 Complete Choice Cash Back offer -- \$6,200

\$100 1FR + 2 Cash Back offer -- \$3,500

\$50 1FR + 2 Cash Back offer -- \$6,700

SOUTH CAROLINA

\$100 Complete Choice Cash Back offer -- \$26,500

\$100 1FR + 2 Cash Back offer -- \$7,400

\$50 1FR + 2 Cash Back offer -- \$41,850

6. Please identify all AT&T documents in dPi's possession, custody, or control that relate in whole or in part to dPi's requests for cashback promotional credits.

ANSWER:

Please see the documents attached within the First Request for Production of Documents.

7. Please identify all AT&T representatives that dPi (or any Person and/or third party working on behalf of dPi) has spoken with regarding dPi's requests for cashback promotional credits.

ANSWER:

Kristy Seagle, Keith Deason, Pam Tipton

- a. For any AT&T representative identified, please describe the substance of such conversations and the time frame when such conversations occurred.

ANSWER:

Will supplement

- b. For any AT&T representative identified, please identify all documents, including emails and written correspondence, regarding cashback promotional credits.

ANSWER:

Please see the documents attached within the First Request for Production of Documents.

8. Please describe the process that dPi or any Person and/or third party acting on behalf of dPi (for example, Lost Key) used (or uses) to ensure that its requests for cashback promotional credit complied (or comply) with the requirements of the respective promotion.

ANSWER:

Lost Key Telecom used an automated system for evaluating data for all credit requests it submitted to BellSouth. The evaluation begins with the service order and all of its features which may be relevant to deciding whether or not it satisfied the requirements of the promotions: including date of service order, location of prior service, company of prior service, and added call features.

The service order is evaluated by an automated system. The evaluation process takes each service request and compares it to the promotions. The request is reviewed to see if it was made at a time a promotional credit was available, and if so, it is reviewed to determine if it meets the other qualifying criteria.

The results of the automated system search are visually inspected each time to see if, as a whole, they trend as they have in the past and there are no gross discrepancies. Should such a discrepancy manifest itself, the data (orders) would be sampled and inspected/verified manually to check for potential errors. If there were any errors found, Lost Key Telecom examined the programming code and ran through orders one at a time to determine the source of the error. Once errors were found and corrected, the credits were re-run before submission to AT&T.

Once the orders are determined to qualify for the promotion, they are submitted to AT&T to be credited.

a. Does dPi have any role in this process?

ANSWER:

See above response to Interrogatory 8. dPi is a client of Lost Key Telecom. Lost Key has developed a proprietary automated system to generate credit requests. dPi is involved only at the level of identifying available promotions, ensuring data is transmitted to Lost Key Telecom from AT&T, requesting Lost Key make the credit requests, and seeking audits when credit refunds are substantially below what is expected.

b. Is this process performed entirely by a third party or Person?

ANSWER:

See above response to Interrogatory 8. Lost Key performs essentially all of the analysis and credit requests.

c. If you answered Interrogatory 8(a) affirmatively, describe dPi's role in this process.

ANSWER:

See above response to Interrogatory 8 and 8(a).

9. **Of the promotional requests at issue in this proceeding, did dPi submit any request to AT&T Florida in response to a dPi end user request for a cash back promotional credit?**

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

The FCC rules on resale are found in the Code of Feder Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates

....

(e) Except as provided in §51.613 [relating to cross-class selling and short term promotions], *an incumbent LEC shall not impose restrictions on the resale* by a

requesting carrier of telecommunications services offered by the incumbent LEC.

47 C.F.R. § 51.613 Restrictions on resale.

(a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:

(1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the only to a certain class of customers eligible for the promotin – i.e., if the ILEC's promotion is directed to residential customers, the CLEC cannot cross sell it to business class customers.]

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

Furthermore, the parties' contract concedes that:

- a. the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" General Terms and Conditions ("GTC") p.1;
- b. "... this agreement *shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC....*" GTC p. 15.
- c. "...*Subject to effective and applicable FCC and Commission rules and orders, BellSouth shall make available to dPi for resale those telecommunications services BellSouth makes available...to customers who are not telecommunications carriers.*"Resale Attachment's General Provision sections 3.1, p. 3
- d. "When dPi purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be be ... subject to the same conditions... that BellSouth provides to its ...End Users." General Terms and Conditions ("GTC") p. 4;

Accordingly, the only information relevant to determining whether AT&T has met its

obligations under the FTA and FCC's rules is (1) the terms and conditions under which AT&T makes certain offers to its retail customers; and (2) whether it makes the same offers available to resellers, like dPi.

However, the information sought by AT&T is information not related to the terms and conditions under which AT&T provides service to its retail customers, or to whether AT&T makes its retail offers available to resellers. Instead, AT&T seeks information about *dPi's interactions with third parties* – dPi's customers, which is utterly irrelevant and inadmissible in this case.

Again, the ONLY question before this tribunal is whether *AT&T* is required to extend promotional pricing for which *AT&T's retail* customers qualify to *dPi* as a wholesaler. As a matter of law, the sole areas of appropriate inquiry in this case are: (1) the meaning and construction of the promotion at issue; and (2) AT&T's past practices in making the promotion pricing available to its retail and other wholesale customers. Inquiries into *dPi's* relations with *third parties* – e.g., whether dPi passes on all or some of the promotional savings to its customers – have absolutely no bearing on the questions this tribunal must answer and are nothing more than a sideshow and a diversion.

Here, because it is utterly irrelevant, the probative value of the information requested is zero, and thus the burden of producing the material obviously exceeds the zero probative value of the information requested.

- a. **If you answered Interrogatory 9 affirmatively, identify all documents that memorialize all such requests by a dPi end user or that otherwise support your response to Interrogatory 9.**

ANSWER:

Not Applicable

10. **When dPi receives a cash back promotional discount on wholesale services purchased from AT&T, how much (if any) of the promotional discount does dPi pass on to its end users?**

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); see *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995).

It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

11. Please explain the process by which dPi passes amounts described in Interrogatory 10 to its end users and identify all documents that memorialize such process.

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

12. Have any of dPi's promotional credit requests to AT&T in Florida been approved (i.e., paid by AT&T to dPi)?

ANSWER:

For the period of time this suit covers AT&T has not approved any promotional credit requests submitted by dPi.

a. if you answered "yes," what is the amount that dPi has received in cashback promotional credits and when did dPi receive such credits?

ANSWER:

Not Applicable

b. if you answered "yes," please identify all dPi documents associated with each cash back promotional request that has been approved in whole or in part by AT&T and all AT&T documents in your possession that acknowledge (or approve) the same.

ANSWER:

Not Applicable

13. If you answered Interrogatory 12 in the affirmative, did dPi pass the promotional discount on to its end users?

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); see *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has*

complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

14. If you answered Interrogatory 13 in the affirmative, please identify all documents that demonstrate that dPi passed the promotional discount on to its end users.

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla. 1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers.* The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

15. Identify every action in the ordering process by which the dPi end user specifically orders (or requests) a cash back promotion.

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

16. Does the dPi ordering process include any requirement for its sales representatives to offer a cash back promotion to its customers?

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

a. if you answered "yes" describe such requirement with particularity, and identify all documents that support your response to Interrogatory 16.

ANSWER:

Not Applicable

17. Please state the number of Florida customers dPi had as of December 2003.

ANSWER:

Will supplement

18. Please state the number of dPi customers in Florida as of September 1, 2009.

ANSWER:

Will supplement

19. Please state the number of dPi customers in Florida as of June 1, 2007.

ANSWER:

Will supplement

20. If successful in this proceeding, does dPi intend to pass on to its end users the promotional discounts dPi may be awarded in this proceeding?

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has*

complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

- a. if you answered "yes," what is the amount dPi intends to pass on to its end users?

ANSWER:

Not Applicable

- b. if you answered "yes," describe the process by which dPi intends to use to pass on promotional discounts to its end users.

ANSWER:

Not Applicable

21. Please identify all dPi representatives or any Person and/or third party working on behalf of dPi that has spoken with any AT&T representative regarding dPi's requests for cash back promotional credits.

ANSWER:

Steve Watson, Brian Bolinger, Thomas O'Roark, Beth Murphy, Aggie Weemes, Ed Brunet

- a. For any dPi representative and/or third party working on behalf of dPi identified, please describe the substance of such conversations and the time frame when such conversations occurred.

ANSWER:

Please see response to 7(a)

- b. For any dPi representative and/or third party working on behalf of dPi identified, please identify all documents, including emails and written correspondence, regarding cash back promotional credits.

ANSWER:

Please see response to 7(b)

22. Did dPi offer its end users the ability to receive a cashback promotion in exchange for initiating service in Florida from December 2003 to June 2007?

ANSWER:

OBJECTION; irrelevant; not calculated to lead to the discovery of relevant evidence; burdensome and harassing.

Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); see *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla. 1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

In this case the issue before the Commission (as stated in dPi's complaint) is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers*. The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made the same offer it extends to AT&T's retail customers available to dPi.

For more information, see objection to Interrogatory 9, which is incorporated herein by reference to same as if set forth at length.

23. If you deny AT&T's Request for Admission No.1, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

24. If you deny AT&T's Request for Admission No.2, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identity all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

25. If you deny AT&T's Request for Admission No.3, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

26. If you deny AT&T's Request for Admission No.4, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

27. If you deny AT&T's Request for Admission No.5, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

28. If you deny AT&T's Request for Admission No.6, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

29. If you deny AT&T's Request for Admission No.7, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your

knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Please refer to the documentation attached to the First Request for Production of Documents and also available from the Florida Public Service Commission showing that dPi Teleconnect is registered to provide service to any "person, firm, corporation or any other entity which orders service and is responsible for payment of charges due and compliance with the Company's tariff regulations."(Florida Telecommunications Tariff page 6)

30. If you deny AT&T's Request for Admission No.8, please state each reason and basis for this denial. In answering this interrogatory, please identify all sources of your knowledge and identify all documents that you reviewed and relied upon in order to deny the referenced Request for Admission.

ANSWER:

Not Applicable

090258-TP (dPi)
AT&T Florida's Motion to Compel
Exhibit C

OFFICIAL COPY

1 PLACE: Dobbs Building, Raleigh, North Carolina
2 DATE: Thursday, November 12, 2009
3 DOCKET NO.: P-55, Sub 1744
4 TIME IN SESSION: 10:03 A.M. - 4:37 P.M.
5 BEFORE: Commissioner William T. Culpepper, III, Presiding
6 Chairman Edward S. Finley, Jr.
7 Commissioner Bryan E. Beatty

8 IN THE MATTER OF:

9 BellSouth Telecommunications, Inc.: Complaint of dPi
10 Teleconnect, LLC

11
12 A P P E A R A N C E S:

13 FOR AT&T NORTH CAROLINA:

14 Edward L. Rankin, III
15 Patrick W. Turner
16 AT&T North Carolina
17 P.O. Box 30188
18 Charlotte, North Carolina 28230

19 FOR THE USING AND CONSUMING PUBLIC:

20 Lucy Edmondson, Staff Attorney
21 Public Staff - North Carolina Utilities Commission
22 4326 Mail Service Center
23 Raleigh, North Carolina 27699-4326
24

1 1 being the supplemental discovery.

2 MR. MALISH: Oh, okay.

3 COMMISSIONER CULPEPPER: That's correct. And
4 now we're talking about O'Roark Cross-Examination Exhibit
5 No. 2, which is what, Mr. Turner?

6 MR. TURNER: Yes, sir. This is a page from
7 dPi's website that sets forth pricing information for its
8 services here in North Carolina.

9 COMMISSIONER CULPEPPER: All right. Let the
10 document be identified as previously stated.

11 Q. Tell me when you're ready, Mr. O'Roark.

12 A. Okay.

13 Q. Mr. O'Roark, at the bottom of this document there
14 is an indication that this comes from the dPi website and
15 was printed on November the 10th, 2009, two days ago,
16 right?

17 A. Okay.

18 Q. I'm sorry, Mr. O'Roark, I didn't hear your answer.

19 A. Yes, that's what it says.

20 Q. On the first page of the document, at the top
21 left, this is a quote for basic service for dPi. Could
22 you give us the price that appears for dPi's basic service
23 there?

24 MR. MALISH: Excuse me for a moment. I

1 understand that the Commission is -- sort of allows broad
2 cross-examination, but I -- you know, in the interest of
3 conserving time, I would move to object to this line of
4 questioning as irrelevant.

5 Again, they're going into the pricing that dPi
6 has with its retail customers and I don't see how that
7 could possibly be related to the basic question of whether
8 AT&T is obligated to provide the offers that it makes
9 available at retail to resellers like -- like dPi. It's
10 just -- it's just inquiring about matters that -- entirely
11 extraneous to that decision.

12 COMMISSIONER CULPEPPER: All right. Well, I'm
13 going to overrule your objection, Mr. Malish. You may
14 proceed.

15 Q. Mr. O'Roark, on page 1 at the top left under
16 "Quote," tell us the price for basic service that is
17 quoted there.

18 A. You want me to read from this thing you've handed
19 me? Basic Total 39.99, is that what you want me to read?

20 Q. I'm asking you the price that's indicated on this
21 exhibit for the basic service that dPi provides in North
22 Carolina. What is it?

23 A. It says Basic Total, 39.99.

24 Q. Go with me to page 3 of the document. This is an

1 order summary that is, again, taken from the dPi website.
2 If you look at the top right corner, you'll see that ZIP
3 code there.

4 A. Uh-huh.

5 Q. Will you accept subject to check that that is a
6 ZIP code for Charlotte, North Carolina?

7 A. 28202?

8 Q. Yes, sir.

9 A. If you say so. Okay.

10 Q. In the middle of the page under product name,
11 there is a chart that goes from month one to month nine.
12 Do you see that?

13 A. Yes.

14 Q. As I read this chart, the -- today the total
15 amount that a dPi end user pays for basic service in North
16 Carolina is \$55.60 in month one; is that correct?

17 A. That's what it says.

18 Q. Well, Mr. O'Roark, you're the CEO of this company.
19 I asked you these questions in your deposition in August.
20 Is that an accurate number or not?

21 A. I don't have my product catalog in front of me. I
22 don't have access to that database from this desk and we
23 have -- we operate in 30-plus states. We have different
24 prices, different products for every ILEC in every state.

090258-TP (dPi)
AT&T Florida's Motion to Compel
Exhibit D

OFFICIAL COPY

1 PLACE: Dobbs Building, Raleigh, North Carolina
2 DATE: Thursday, November 12, 2009
3 DOCKET NO.: P-55, Sub 1744
4 TIME IN SESSION: 10:03 A.M. - 4:37 P.M.
5 BEFORE: Commissioner William T. Culpepper, III, Presiding
6 Chairman Edward S. Finley, Jr.
7 Commissioner Bryan E. Beatty

8 IN THE MATTER OF:

9 BellSouth Telecommunications, Inc.: Complaint of dPi
10 Teleconnect, LLC

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12 A P P E A R A N C E S:

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1 time period at issue, which is prior to June of 2007.
2 During that time period, AT&T would sell telecommunication
3 service to dPi at the resale rate established by the
4 Commission. So we provided the resale discount, but AT&T
5 would not provide the cash back portion of that offering.
6 And that's the dispute here.

7 One of our defenses in the case is that dPi
8 waited too long to ask for those credits or to dispute the
9 denial. You'll hear a lot about that on cross, but that
10 aspect of our defense does not relate to the Motion to
11 Compel. The Motion to Compel relates to our second
12 primary defense.

13 The FCC has said and the Fourth Circuit has
14 affirmed that a -- an incumbent local exchange company can
15 place reasonable and nondiscriminatory restrictions on the
16 resale of its services. We contend that our denying these
17 credits is just that, a reasonable and nondiscriminatory
18 restriction on the resale of these services.

19 In a prior docket, the Commission entertained
20 that type of dispute. It went up through the district
21 court and ultimately to the Fourth Circuit in the Sanford
22 decision. In the orders that the Commission entered,
23 which discussed a cash back offering just like you have in
24 front of you now, in those orders the Commission gave

1 guidance. It said here is some factors we will consider
2 if a party comes and tries to say this is a reasonable and
3 nondiscriminatory restriction. One of those factors is
4 will competition be stifled or unduly harmed if the resale
5 is not available. The other -- another factor is the
6 extent to which a reseller offers promotional inducements
7 that are different than the inducements offered by the
8 ILEC.

9 The third factor that is relevant today is the
10 Commission noted that while it was possible that a
11 reseller might not pass all the benefit along to its end
12 user, the Commission said it's unlikely -- and I'm quoting
13 from your Order -- "unlikely because a reseller's success
14 is based on being able to sell services at prices that are
15 competitive with the ILEC's prices in the marketplace."

16 In discovery, we have asked dPi for information
17 related to what services do you sell at what prices to
18 your customers in North Carolina. We believe that
19 question is directly relevant to the three issues that
20 this Commission said that you would consider in
21 determining our defense. It goes to whether competition
22 is stifled or harmed; it goes to the extent to which they
23 may offer inducements that are different than ours; and it
24 also goes to the extent to which they do or do not attempt

1 to compete with us on a price basis.

2 We believe the information that we will present
3 today and that we will attain through discovery will show
4 that they do not. Now, dPi can certainly argue the merits
5 of what that does and doesn't show, but we are convinced
6 that we are entitled to obtain it in discovery and to ask
7 that type of question on cross-examination. All of the
8 questions are designed to get information that is relevant
9 to those matters and we would request -- respectfully
10 request that you grant our Motion to Compel. Thank you,
11 sir.

12 COMMISSIONER CULPEPPER: All right. Let me ask
13 you something while I've got it on my mind. And it -- it
14 may be more toward the case in chief than -- than the
15 Motion to Compel. I think you've already alluded to that,
16 but since you brought it up and it's fresh on my mind,
17 before I forget it, you indicate that one of the defenses
18 that your client would have against the Complainant's
19 complain -- Complaint -- Complaint is that it waited too
20 long to bring this matter forward, make the request and
21 then bring this complaint.

22 When you say waited too long, are you talking
23 about a statute of limitations matter or you talking about
24 an equitable defense of laches or both or which -- what's

1 -- what are you talking about in that regard?

2 MR. TURNER: Really two things. One, there --
3 we will demonstrate in our cross that there was a
4 contractual obligation that dPi committed not to dispute
5 on amount that we had billed more than a year after that
6 amount was submitted. We'll demonstrate that they did not
7 comply with that contractual obligation. So in that sense
8 we believe it is contractual time limitations that they
9 have failed to comply with.

10 Beyond that, we will demonstrate that they
11 waited a long time to ask; they waited a longer time to
12 dispute, which also, in our view, violates their
13 contractual obligations, and by the time that they brought
14 it to the Commission some of the evidence was no longer
15 available. So I believe it is a combination, sir, of
16 contractual obligations, laches and possibly statute of
17 limitations.

18 COMMISSIONER CULPEPPER: Okay. Since you say
19 statute of limitations, if that were to be something --
20 and I'm not saying that it will be. We haven't heard the
21 case. If that were something that we would have to make
22 some kind of decision on, there's -- there's -- seems to
23 be indication that the state law applicable to the
24 interconnection agreement is the State of Georgia; is that

1 correct?

2 MR. TURNER: I think there is a provision of
3 that nature, yes, sir. And we concede that that State of
4 Georgia law would apply to the general terms and
5 conditions. We do not mean to concede that that means
6 that the Georgia Commission's rulings on
7 interconnection --

8 COMMISSIONER CULPEPPER: Well, I understand that
9 part. I'm not talking about the Georgia Commission.

10 MR. TURNER: Yes, sir. But, yes, sir --

11 COMMISSIONER CULPEPPER: I'm talking about
12 the -- whatever the state law of Georgia, whatever the
13 limitation of actions law in Georgia is with respect to a
14 case like this. Is -- do you concede that that is
15 applicable --

16 MR. TURNER: Yes, sir.

17 COMMISSIONER CULPEPPER: -- if we get to that
18 point? And it seems to me that it's stated that that
19 period under Georgia law is -- if we're talking about a
20 breach of contract -- is six years; is that --

21 MR. TURNER: Yes, sir. We concede.

22 COMMISSIONER CULPEPPER: Okay. You concede to
23 that. Okay. Thank you for that.

24 Now, let me ask you this: Regarding the cash

1 back, what form would this cash back take? I mean, was it
2 a credit to the customer's bills or was it a coupon for
3 \$50 or a check for \$50? What form would it take?

4 MR. TURNER: Yes, sir. Need to answer that in
5 two ways. One, on the retail side, that we made it
6 available to our end user customers; and then two, if the
7 question also was what form did it make -- did we make it
8 available to dPi, I can answer that as well.

9 COMMISSIONER CULPEPPER: Right.

10 MR. TURNER: On the retail side, the three
11 promotions that are at issue here, each involved a coupon
12 that was sent to the customer after they purchased the
13 services. And the customer had to turn around and redeem
14 that coupon within a stated amount of time, usually 90
15 days. If AT&T's end user customer received the coupon and
16 did not turn it in within that 90-day time frame, they did
17 not receive the benefit.

18 COMMISSIONER CULPEPPER: When you say "turn it
19 in," would it be a credit on their bill? Is that what it
20 was? What was it?

21 MR. TURNER: So they would send the coupon back
22 to a designated address. And when that coupon was
23 received, AT&T would send a check to the customer. So
24 actual benefit to the end user customer took the form of a

1 check.

2 COMMISSIONER CULPEPPER: Cash money --
3 eventually cash money when they cashed the check?

4 MR. TURNER: Yes, sir.

5 COMMISSIONER CULPEPPER: So the deal was AT&T
6 would send the coupon, the customer would be required to
7 send the coupon back to AT&T, and if AT&T got the coupon
8 back within a prescribed time, then the customer would get
9 a check from AT&T?

10 MR. TURNER: Yes, sir.

11 COMMISSIONER CULPEPPER: Not a credit on the
12 bill, but a check?

13 MR. TURNER: Not a bill credit, no, sir.

14 COMMISSIONER CULPEPPER: Okay. All right.

15 Thank you.

16 MR. TURNER: Yes, sir.

17 COMMISSIONER CULPEPPER: Other Commissioners
18 have questions?

19 (No response.)

20 All right. Thank you very much. You may have a
21 seat. And, Mr. Malish, I'll be glad to hear from you.

22 MR. MALISH: Thank you, Mr. Chairman. Again,
23 it's Chris Malish here on behalf of dPi. And as I
24 mentioned earlier during the informal housekeeping

1 get-together at the bench, we have a more formal extended
2 written reply that's being filed today.

3 The first part of our reply to that Motion to
4 Compel is that in its original Order this Commission set
5 out a time frame for -- in which discovery was to take
6 place. And that ended at some point in 2008. Now, in
7 2009 we agreed to provide some additional information to
8 AT&T and we answered some questions that they had. We
9 provided a witness for deposition voluntarily. However,
10 we did not voluntarily agree to provide information on
11 things that we consider to be completely irrelevant to the
12 question that this tribunal must decide. And that's where
13 we objected to some of the materials that they are asking
14 from here.

15 Because the underlying -- the underlying law
16 here is what -- what drives the inquiry. The Federal
17 Telecommunications Act requires that AT&T resell the rates
18 -- resell the services that it provided to its end users
19 to resellers at wholesale rates. And, of course, the --
20 you know, when you get \$100 cash back from AT&T, that
21 affects your -- your rate that your -- you know, the net
22 rate that you're actually paying for that service.

23 The things that they were asking us for was
24 information about what we do with those discounts if we

1 get them from AT&T. So generally what happens -- and I'll
2 go over this in my opening statement because it is kind of
3 at the core case in its entirety -- but at the end of the
4 day the question is is AT&T providing the same offer to
5 dPi that it is providing its own retail customers. And
6 that's it. That's the end of the question.

7 They are allowed to put restrictions on the
8 offers that they make from retail to resale and there are
9 examples of that that the -- that the FCC has noted are
10 reasonable. For example, restrictions that prevent
11 promotion that's directed primarily at business customers,
12 that's something that can't be -- if you sell it to one
13 class of customers, business customers, you can't turn
14 around as a reseller and sell it to retail customers.
15 That's the kind of discrimination or restriction that is
16 -- has been decided is okay. But the kind that they're
17 talking about is not.

18 So the end inquiry is simply whether they've
19 made us the same offer and if they haven't, what they've
20 done is illegal and it violates not just the law, but also
21 the contract. And so when they ask about our relations
22 with third parties, our customers, that is outside of the
23 kinds of things that this Commission needs to look at to
24 reach a decision in this case and so that's why we've

1 resisted the discovery on those matters.

2 And there will be more information in our
3 written response, but that's just at a very high level
4 where we're coming from. And I am happy to answer
5 questions.

6 COMMISSIONER CULPEPPER: All right.

7 Commissioners have any questions?

8 (No response.)

9 All right. Thank you. Ms. Edmondson, do you
10 care to be heard on the Motion to Compel?

11 MS. EDMONDSON: No.

12 COMMISSIONER CULPEPPER: All right. Thank you.
13 Well, gentlemen, as I indicated to you, I was inclined to
14 take the matter under advisement with respect to the
15 motion and I'm going to do that. I'm not going to rule on
16 it today. I'm going to take the matter under advisement.

17 Now, it's been represented by Mr. Malish on
18 behalf of his client that they are intending to file a
19 written response, which is something new that apparently
20 has not been filed yet. And it is in reply to, I suppose,
21 the Motion to Compel and per -- and hopefully the
22 underlying discovery.

23 And assuming that takes place, Mr. Rankin,
24 Mr. Turner, of course I know y'all are going to take a

090258-TP (dPi)
AT&T Florida's Motion to Compel
Exhibit E

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2008-160-C - ORDER NO. 2009-396

JUNE 18, 2009

IN RE:	Complaint of dPi Teleconnect, LLC v.)	RULING ON AT&T'S
	BellSouth Telecommunications, Inc. d/b/a)	MOTION TO COMPEL
	AT&T South Carolina, Regarding BellSouth's)	DISCOVERY AND DPi'S
	Failure to Extend Cash Back Promotions to)	MOTION TO STRIKE
	dPi)	
)	

This matter comes before the Public Service Commission of South Carolina ("Commission") on BellSouth Telecommunications, Inc d/b/a AT&T South Carolina's ("AT&T") motion to compel discovery and dPi Teleconnect, LLC's ("dPi") motion to strike a portion of AT&T's laches defense that arguably supports AT&T's request for that discovery. AT&T wants the discovery to attempt to prove its burden that its decision to not offer a promotion to dPi was reasonable and nondiscriminatory. AT&T is arguing that the uses to which dPi has put such promotions may tend to support its contention that failure to offer the promotion does not have discriminatory effects on competition. dPi argues that the requested discovery is irrelevant due to the duties it claims AT&T has to offer it all promotions that are offered to its own customers for more than 90 days.

The Commission is convinced that federal law supports the fact that state commissions may review such questions regarding 90+ day promotions on a promotion-by-promotion basis, therefore the requested discovery could lead to evidence that may be relevant to the case that will be presented at hearing. We therefore grant AT&T's motion


to compel discovery and deny dPi's motion to strike a portion of AT&T's laches defense as moot based on the granting of AT&T's discovery motion.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:


Elizabeth B. Fleming, Chairman

ATTEST:


John E. Howard, Vice Chairman
(SEAL)