BELLSOUTH

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November 7, 2006

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: dPi Teleconnect, LLC, Complainant/Petitioner v. BellSouth Telecommunications, Incorporated, Defendant/Respondent
Docket No.: 2005-358-C

Dear Mr. Terreni:

Enclosed for filing are an original and one (1) copy of BellSouth Telecommunications, Inc.'s Motion to Appoint a Hearing Officer to Establish a Procedural Schedule in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this motion as indicated on the attached Certificate of Service.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
PC Docs #657139

THIS DOCUMENT IS AN EXACT DUPLICATE OF THE E-FILED COPY SUBMITTED TO THE COMMISISON IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2005-358-C

In Re:	)	
	)	
dPi Teleconnect, L.L.C.	)	
	)	Motion to Appoint a
	)	Hearing Officer to
	)	Establish a Procedural Schedule
v.	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	

On February 10, 2006, BellSouth Telecommunications, Inc. ("BellSouth") filed an unopposed motion asking the Public Service Commission of South Carolina ("the Commission") to hold this matter in abeyance, explaining that "dPi and BellSouth have reached an agreement to hold this proceeding (as well as similar proceedings pending before other State commissions) in abeyance until 30 days after a dispositive order is issued in the [companion State commission] proceeding in North Carolina."[1] The Commission entered an Order providing that:

> The proceeding shall be held in abeyance. However, the parties shall notify this Commission of the disposition of this matter <u>with the North Carolina Commission</u>, and shall furnish a copy of an Order issued <u>by that Commission</u>. The Commission specifically reserves its authority to re-

[1] *See* Unopposed Motion to Hold Proceeding in Abeyance, *In Re: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.*, Docket No. 2005-358-C (February 10, 2006). Counsel for dPi reviewed and approved the language of the Motion before it was filed.

> open these proceedings at that time so it can determine whether any further action need be taken in this Docket.[2]

On June 21, 2006, counsel for dPi filed a letter advising the Commission that "a decision was issued in the North Carolina complaint on June 7, 2006" and that "the decision is not yet final and I intend to file a motion for reconsideration on or before June 30, 2006." Then, on October 30, 2006, counsel for dPi filed another letter advising the Commission that "an order denying dPi's Motion for Reconsideration was issued in the North Carolina complaint on October 12, 2006." In that letter, dPi's makes the bold statement that because dPi has appealed the North Carolina Commission's orders, "[n]o action should be taken on this case until a final decision is rendered in this appeal."

BellSouth strongly disagrees with this statement. BellSouth and dPi agreed to hold this proceeding (as well as similar proceedings pending before other State commissions) in abeyance until 30 days after a dispositive order is issued in the [companion State commission] proceeding in North Carolina."[3] The North Carolina Commission proceeding was specifically cited in the *Joint Motion* for clarity – BellSouth did not agree to hold the matter in abeyance while dPi appealed the North Carolina Commission's orders, and BellSouth does not agree to do so now. Instead, a dispositive order – one that rules against dPi's erroneous positions on the merits – has been issued by the North Carolina Commission, and BellSouth desires to move forward with this South Carolina proceeding as contemplated by the plain language of the parties' agreement.

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[2] Order Holding Proceeding in Abeyance, *In Re: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.*, Order No. 2006-121 in Docket No. 2005-358-C (February 27, 2006)(emphasis added).

[3] *See* Unopposed Motion to Hold Proceeding in Abeyance (emphasis added).

More importantly, the Commission's Order holding this proceeding in abeyance clearly contemplates that the Commission (not dPi) will "determine whether any further action need be taken in this Docket" after the parties provide the Commission with a copy of the North Carolina Commission's order. Attachments A and B to this Motion are copies of the North Carolina Commission's Order and Order on Reconsideration, respectively.

BellSouth, therefore, respectfully requests that the Commission appoint a hearing officer to establish a procedural schedule setting forth testimony due dates and a hearing date in order to bring this South Carolina proceeding to a conclusion. This matter has been pending for nearly a year, and dPi should be prepared to proceed. Given the end of the abeyance period, BellSouth submits that it is now time for dPi to either act on its complaint or to dismiss it.[4] At this point, if the South Carolina complaint is not dismissed, then the Commission should allow BellSouth to put on evidence, as it did in North Carolina, establishing that dPi is not entitled to any relief. BellSouth should not be delayed further in bringing this matter to resolution

Respectfully submitted,

By: Patrick Turner

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ATTORNEY FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

656918

[4] As the Commission is aware, dPi has the option at this juncture to withdraw its complaint without prejudice. *See* S.C. Code Ann. §58-9-255(e).

ATTACHMENT A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1577

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Complaint of dPi Teleconnect, L.L.C. Against BellSouth Telecommunications, Inc. Regarding Credit for Resale of Services Subject to Promotional Discounts	))))	ORDER DISMISSING COMPLAINT

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Wednesday, March 1, 2006, at 9:22 a.m.

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Chair Jo Anne Sanford and Commissioner Sam J. Ervin, IV

APPEARANCES:

For dPi Teleconnect, L.L.C.:

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

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

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

Andrew D. Shore, BellSouth Telecommunications, Inc., 675 W. Peachtree Street NE, Suite 4300, Atlanta, Georgia 30375

For the Using and Consuming Public:

Robert S. Gillam and Ralph J. Daigneault, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On August 25, 2005, dPi Teleconnect, L.L.C. (dPi) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking credit for resale of services subject to promotional discounts resulting from their interconnection agreement and a hearing. Among other things, dPi resells BellSouth's retail residential telephone services, some of which are subject to BellSouth promotional discounts. On September 19, 2005, BellSouth filed an answer denying dPi's claims and requesting that the Commission dismiss the complaint.

On November 1, 2005, the Commission issued an Order Scheduling Docket for Hearing and Prefiling of Testimony. The hearing was scheduled for Tuesday, February 21, 2006. The Commission requested that the Public Staff participate as an intervenor. On January 4, 2006 the Commission issued an Order Canceling Hearing because of a scheduling conflict. On January 5, 2006, the Commission issued another Order Scheduling Docket for Hearing. The hearing was rescheduled for Wednesday, March 1, 2006. On January 20, 2006, the Commission issued an Order Granting Motion to Change Filing Dates.

As required by the Commission's November 1, 2005 and January 20, 2006 orders, BellSouth filed the testimony of Pam Tipton, a Director in BellSouth's regulatory organization on January 27, 2006. On that same day, dPi filed the testimony of Brian Bolinger, dPi's Vice President of legal and regulatory affairs, and Steve Watson of Lost Key Telecom, Inc., a consultant and billing agent for competing local providers of telecommunications service (CLPs). BellSouth and dPi filed the rebuttal testimony of their respective witnesses on February 10, 2006.

The Public Staff filed a Notice of Intervention on February 27, 2006, but did not file testimony or present witnesses.

An evidentiary hearing was held on March 1, 2006 in Raleigh, North Carolina with each of the above witnesses presenting direct and rebuttal testimony as well as exhibits.

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

FINDINGS OF FACT

1. BellSouth is duly certified as an incumbent local exchange carrier (ILEC) providing retail and wholesale telecommunications service in its North Carolina service area. BellSouth has a duty to offer any telecommunications service that BellSouth offers to its retail customers to competing local providers (CLPs) at wholesale rates for resale. 47 USC 251(c)(4). Pursuant to this obligation, BellSouth permits CLPs to resell discount promotional plans that BellSouth offers to its retail customers.

2. dPi is duly certified as a CLP and purchases telephone service from BellSouth for resale to its end user customers in North Carolina on a prepaid basis.

3. Among the vertical features that BellSouth makes available to end users are call return, repeat dialing and call tracing. These features are available on a per-use basis, as well as a flat-rate monthly basis. The customer has the option to block the utilization of these features on a per-use basis.

4. As a prepaid service provider, dPi, when it purchases service from BellSouth, routinely directs BellSouth to block the per-use utilization of call return, repeat dialing and call tracing.

5. From January 2004 through November 2005, which is the period in issue in this proceeding, BellSouth had in effect a promotion known as the Line Connection Charge Waiver (LCCW). Under this promotion, when a residential customer established new local service with BellSouth and purchased basic service and at least two custom calling features, BellSouth would waive the Line Connection Charge.

6. Under BellSouth's customary procedure, end user customers who qualify for the LCCW promotion are identified at the time they purchase service and are not billed for the Line Connection Charge. However, resellers are required to pay the full wholesale price for any service they purchase, even if the service qualifies for a promotion, and then submit documentation of the promotional credits to which they are entitled. If BellSouth agrees that a reseller is entitled to benefit from a promotion, it will credit the reseller for the appropriate amount. The form that resellers are required to submit to BellSouth when they request promotional credits has been designated by BellSouth as the "BellSouth Interconnection Billing Adjustment Request Form (BAR)."

7. In reviewing dPi's BAR forms, BellSouth took the position that a customer is entitled to benefit from the LCCW only if the customer purchases basic service and two custom calling features for which a charge is made. BellSouth's position is that acquiring the free blocking services BCD, BRD and HBG does not qualify a customer for the LCCW. Accordingly, BellSouth determined that dPi should be given credit for the LCCW only for those of its end users who had purchased two or more paying features in addition to the free blocking services.

8. The BellSouth/dPi interconnection agreement provides that, "Where available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly."

9. BellSouth has applied its LCCW promotion as being applicable only to its own customers who purchase basic service and two or more "TouchStar features" for which a charge is made. As a result, given the provisions of the parties' interconnection agreement, dPi is not entitled to credit for customers who purchase only basic service and free blocking features.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 1-2

These findings of fact are essentially informational, procedural, and jurisdictional in nature, and the matters which they involve are uncontroversial. They are supported by information contained in the parties' pleadings and testimony and the Commission's files and records regarding this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 3-9

These findings of fact are supported by the testimony and exhibits of dPi witnesses Bolinger and Watson and BellSouth witness Tipton. In general, the witnesses did not contradict each other, but rather offered opposing perspectives on the transactions between the parties. The issues before the Commission involve the proper conclusions to be drawn from largely undisputed facts.

BellSouth is an ILEC. As an ILEC, BellSouth has a duty to offer any telecommunications service that BellSouth offers to its retail customers to dPi at wholesale rates for resale. The Federal Communication Commission (FCC) has determined that BellSouth's resale obligations extend to promotional discounts offered on retail communication services which extend for periods in excess of ninety days. dPi witness Bolinger testified that dPi is a CLP, operating in 28 states including North Carolina. (Tr. pp. 28, 34) dPi purchases BellSouth's service and resells that service to its own end-user customers on a prepaid basis. BellSouth makes certain promotions available to its retail customers, and dPi, as a reseller, is entitled to the benefit of these promotions (Tr. p. 34).

BellSouth's service includes a variety of vertical features; the ones at issue in this proceeding are also referred to as TouchStar features. Many of these features are listed on BellSouth Cross-Examination Exhibit 2, and they include call return, repeat dialing and call tracing. A customer may pay BellSouth a monthly fee for the right to use call return, repeat dialing or call tracing on an unlimited basis; alternatively, a customer may pay for any of these features on a per-use basis (Tr. p. 73). A customer may also block the utilization of call return, repeat dialing or call tracing on a per-use basis (Tr. p. 74). As shown on BellSouth Cross-Examination Exhibit 2, the blocking of per-use call return, repeat dialing and call tracing is referred to in BellSouth's system by the codes BCD, BRD and HBG, respectively, and BellSouth furnishes BCD, BRD and HBG to customers upon request, without charge.

Witness Bolinger further testified that, whenever dPi purchases telephone service for resale, it blocks all telephone functionalities that can be billed on a per-use basis (Tr. p. 81). This is common practice among prepaid resellers (Tr. p. 84). Accordingly, in purchasing service from BellSouth, dPi routinely blocks per-use call return, repeat dialing and call tracing.

Witness Bolinger stated that one of the promotions offered by BellSouth during the period at issue in this case was the LCCW (Tr. pp. 35-36). Under the terms of this promotion, which are shown in BellSouth Cross-Examination Exhibit 1, when a new customer establishes local service with BellSouth and purchases basic service with two or more custom calling features, BellSouth's Line Connection Charge is waived.

dPi witness Watson testified that he operates Lost Key Telecom Inc., a firm that provides billing services to CLPs (Tr. p. 101). dPi employed Lost Key to prepare and submit promotional credit claims to BellSouth (Tr. p. 101). Witness Watson stated that, when a retail customer is eligible for a promotion, BellSouth automatically reduces the customer's bill by the appropriate amount (Tr. p. 102). However, BellSouth requires resellers to follow a different procedure. Resellers must initially pay the full charges for the service they purchase; they may then submit a form to BellSouth documenting their eligibility for a particular promotion and requesting a credit for the amount associated with the promotion. BellSouth reviews the refund claim forms and determines whether or not it will provide the requested credit (Tr. p. 102). BellSouth Cross-Examination Exhibit 4 is an example of the form that a CLP must submit in order to obtain a promotional credit.

Witness Watson testified that he submitted BAR forms asserting that dPi was entitled to the LCCW, because it had established local service with three custom calling features – the three blocking features, BCD, BRD and HBG (Tr. pp. 102-04). BellSouth refused to credit dPi for the amount of the Line Connection Charge, contending that, because there was no charge for the blocking features, they were not the type of features that qualified for the LCCW (Tr. p. 104). According to witness Watson, if BellSouth had given dPi credit for the LCCW as it should have done, dPi would have received credits in the amount of at least $185,719.49 (Tr. p. 105).

BellSouth witness Tipton testified that BellSouth properly refused to credit dPi for the Line Connection Charge for lines where dPi's customers received only basic service and blocking of per-use call return, repeat dialing and call tracing. According to witness Tipton, the only features that qualify for the LCCW are features for which a charge is made. Unless dPi purchases local service and two or more paying features for a given line, it is not entitled to the benefit of the LCCW (Tr. pp. 215-19). Witness Tipton stated that, in many instances dPi had submitted invalid promotional credit claims to which it was not entitled, such as claims for CREX charges, which are not the subject of any promotion (Tr. pp. 209-10).[1]

None of the witnesses disputed the testimony of opposing witnesses relating to specific factual occurrences. As noted above, this case does not require the Commission to resolve conflicting accounts of the facts, but rather to determine the proper conclusions to be drawn from the facts. The Commission therefore finds the facts to be as set out above, based on the witnesses' un-contradicted testimony.

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[1] dPi originally alleged that BellSouth improperly denied its requests for discount offered as a result of multiple BellSouth promotions. dPi has since limited its claims to the LCCW promotion. Both parties agree that 99 per cent of the disputes center on this promotion.

Beginning in December, 2003, BellSouth requested permission to offer the LCCW promotion. The letter states:

> "During the promotional period, new residence customers who purchase a BellSouth Complete Choice Plan, BellSouth PreferredPack or Community Caller Plus with two custom calling or TouchStar features will receive a waiver of the Line Connection Charge (as found in Section A4 of the GSST)." dPi Exhibit 2, letter to Robert Bennink, General Counsel of the North Carolina Utilities Commission dated December 15, 2003.

Similarly, by letter dated January 12, 2004, BellSouth provided further clarification of the promotion by stating:

> "During the promotional period, new residence customers who purchase a BellSouth Complete Choice Plan, BellSouth PreferredPack or Community Caller Plus with two custom calling or TouchStar features will receive a waiver of the Line Connection Charge (as found in Section A4 of the GSST).This letter is to advise that this promotion will be available only to customers who are returning their local service to BellSouth." dPi Exhibit 2, Letter of January 12, 2004 to Robert Bennink.

Finally, in a letter dated December 17, 2004, which extends the promotion until December, 2005, BellSouth stated:

> "During the promotional period, eligible customers who purchase a BellSouth Complete Choice Plan, BellSouth PreferredPack or Community Caller Plus with two custom calling or TouchStar features will receive a waiver of the Line Connection Charge. This letter is to advise that BellSouth would like to extend this promotion through December 26, 2005. In order to participate in the extension of the promotion, all orders must be placed on or before December 26, 2005." dPi Exhibit 2, Letter of December 17, 2004 to Robert Bennink.

The executive summary for Line Connection Charge Waiver Extension states that, to be eligible for the LCCW, "the customer must switch their local service to BellSouth and purchase any one of the following: ... BellSouth Basic Service and two (2) custom calling (or TouchStar service) local features." BellSouth Cr. Ex. 1. "TouchStar is a group of central office call management features offered in addition to basic telephone service." BellSouth GSST A13.19.1., BellSouth Cr. Ex. 2. TouchStar service features include call return, repeat dialing, call tracing...[2] GSST A13.19.2., BellSouth Cr. Ex. 2. Call return, repeat dialing and call tracing are available on a monthly or subscription basis. GSST A13.19.2(A)(B) and (C), BellSouth Cr. Ex. 2. "Access to the usage option [i.e., call return, repeat dialing, or call tracing] can be

[2] Although there are more defined TouchStar service features defined in the tariff, only the three listed herein are applicable to this proceeding.

restricted at the customer's request at no charge." GSST A13.19.2(A)(B) and (C), BellSouth Cr. Ex. 2.

dPi restricts access to call return, repeat dialing, or call tracing as permitted by the tariff by including BCR, BCF and HBG (Blocking) features in every new order for basic telephone service. These blocks are not defined features in the TouchStar tariffs. Each block, however, is identified as a feature in the rates and charges section of the TouchStar tariff. GSST A13.19.4, BellSouth Cr. Ex. 2.

The parties to this proceeding have diametrically opposing positions on the interpretation of BellSouth's promotion. dPi argues that "all that is required to qualify for these promotions is the purchase of basic services with two TouchStar features." (Tr. p. 37). Further, dPi argues that it has done all that is necessary to qualify for the promotion discount by ordering at least two of the aforementioned blocks. BellSouth counters that blocks are not purchased features and do not qualify under the promotion. Further, BellSouth contends that dPi customers are ineligible for credits because dPi end users do not meet the same criteria that BellSouth retail customers must meet to benefit from the promotion as required by the interconnection agreement.

dPi urges the Commission to intervene in this dispute to divine the "proper" meaning of the promotion and require BellSouth to pay the appropriate credits. Were it to do so, the Commission would resort to various judicially acknowledged rules to assist it in interpreting the promotion. However, after careful consideration, the Commission concludes that we are not required to analyze and decide this case based on the language of the promotion. The fact is that BellSouth and dPi jointly agreed to methodology for determining the limits of <u>any</u> promotion in their voluntarily negotiated interconnection agreement. The following language governs this Commission's interpretation of this promotion:

> "Where available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." (Exhibit PAT-1).

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

In making this decision, the Commission acknowledges that dPi is at a disadvantage in the promotional process. Ultimately, however, the exact design and

contour of any promotion is completely within the vendor's discretion. BellSouth, like any other vendor, can choose to offer a promotion or not. BellSouth, like any other vendor, can establish terms that permit the consumer to benefit from the promotion or not. There is very little that dPi or this Commission can do to compel BellSouth to change or restructure any promotion unless the terms of the promotion are unconscionable, unconstitutional or violative of the laws or public policy of this State. In this case, there is no evidence that the LCCW promotion offered by BellSouth is unconscionable, unconstitutional or violative of the laws or public policy of this State.

One could argue that it is unconscionable to permit BellSouth to escape its financial responsibility in this case since BellSouth drafted an inherently ambiguous tariff which was reasonably subject to the interpretation adopted by dPi. Ordinarily, an ambiguity is construed against the drafter in situations such as the one at bar. However, dPi has waived its right to rely upon this rule through the bargaining process by agreeing to the aforementioned clause in the interconnection agreement. Thus, in order for us to reach the result that dPi desires, this Commission would be required to disregard the voluntarily negotiated interpretive aid found in the interconnection agreement and, in its place, substitute a judicially created interpretative aid. We decline to do so under these circumstances.

In issuing this Order today, we base our ruling on the unique facts of this case. We expressly decline to determine whether BellSouth's interpretation of the promotion, which prohibits credits being awarded when an end user purchases only basic service and no cost blocking features is correct as such a determination is unnecessary to finally and completely dispose of this case.

Finally, the Commission notes that the Public Staff discussed at length the shortcomings of BellSouth's process for determining which promotional credits dPi was entitled to receive. dPi witness Watson testified that BellSouth does not automatically calculate the promotional credits available to its resale customers at the time an order is submitted, as it does for its retail customers; instead, BellSouth requires resellers to audit their bills and apply for credits after the fact (Tr. p. 102). Moreover, witness Watson testified that BellSouth's system makes it extremely difficult for the reseller to apply for promotional credits. (Tr. p. 108), The credit request must be documented on forms created by BellSouth, listing details of every order for which credit is requested. The data supplied to BellSouth must come from BellSouth's own billing and ordering data, which are traditionally supplied to resellers in paper form or in a "DAB" file that is difficult to work with. Figuring out how to apply for the credits takes a significant amount of resources and time, and, as a result, many CLPs are not able to utilize the promotional credits and discounts.

The Public Staff viewed this process as cumbersome, difficult, and time-consuming to such an extent that the cost of qualifying for a promotion may be higher than the promotional benefit offered by the ILEC. Neither dPi nor BellSouth raised this issue as one to be decided in this proceeding. Nevertheless, the Public Staff invites this

Commission to modify the process to make it less burdensome. We decline the invitation in the context of this complaint proceeding.

If any party in this proceeding desires a more thorough inquiry into this issue, the issue would more appropriately be addressed in a generic proceeding. A generic proceeding would allow these parties and *any other parties with an interest* in the process an opportunity to fully explore BellSouth's process with an eye toward developing a global, universally applicable, solution to any problems identified. This approach is preferable to any limited solution which we could fashion in this proceeding. Thus, if any party, including the Public Staff, desires to resolve this issue, we would consider opening a generic docket upon an appropriate, factually supported petition being filed.

For the reasons set forth herein, dPi's complaint is dismissed.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 7th day of June, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

Ah060606.07

ATTACHMENT B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1577

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, and Chair Jo Anne Sanford

APPEARANCES:

For dPi Teleconnect, L.L.C.:

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

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

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

Andrew D. Shore, BellSouth Telecommunications, Inc., 675 W. Peachtree Street NE, Suite 4300, Atlanta, Georgia 30375

For the Using and Consuming Public:

Robert S. Gillam and Ralph J. Daigneault, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On August 25, 2005, dPi Teleconnect, L.L.C. (dPi) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking credit for resale of services subject allegedly to promotional discounts in accordance with their interconnection agreement. Among other things, dPi resells BellSouth's retail residential telephone services, some of which are subject to BellSouth promotional discounts. The

discount dPi seeks credit for in this proceeding is the Line Connection Charge Waiver (LCCW), which BellSouth gave to customers that purchased certain packages or features.

It was dPi's belief that some of its customers met the requirements of the LCCW by obtaining at least two of the following features: blocking per-use call return, blocking repeat dialing, and blocking call tracing. BellSouth refers to these features by the codes BCR, BRD, and HBG, respectively. BellSouth charges customers for most custom calling features, but it furnishes BCR, BRD, and HBG to customers upon request, without charge. BellSouth believes that customers obtaining BCR, BRD, or HBG did not qualify for the discount because the promotion only provided the discount for purchased features.

On March 1, 2006, the Commission held an evidentiary hearing in Raleigh with witnesses from dPi and BellSouth presenting testimony and exhibits. On April 27, 2006, the Public Staff filed its Proposed Order and dPi and BellSouth filed briefs. On June 7, 2006, the Commission issued an Order Dismissing the Complaint.

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

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

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

The Commission subsequently issued an Order Requesting Comments from BellSouth and the Public Staff and requiring reply comments to be filed by dPi. Briefly summarized, the parties commented as follows:

BellSouth Comments

BellSouth contended that dPi failed to present anything new for the Commission to consider. It simply reiterated statements contained in its earlier brief. dPi's arguments were not persuasive the first time, nor are they now. dPi's claim is founded upon selective use of three months out of two years billing data. dPi has presented absolutely no substantive evidence that refutes the results of the statistically valid sampling analysis presented by BellSouth. As such, the Commission should deny dPi's request for payment of $2,537.70.

BellSouth recommended that the Commission reaffirm its ruling that dPi is not entitled under the terms of the parties' interconnection agreement to credits for BellSouth's Line Connection Charge Waiver Promotion because BellSouth does not and

would not give the promotion to its own End Users with only basic service and free blocks.

Public Staff Comments

The Public Staff stated that it cannot confirm whether dPi's claims for $2,537.70 in credits for wrongfully denied transfers/winovers are legitimate without a review of each credit request submitted by dPi. The Public Staff recommended that Bellsouth should examine each credit request individually, without the use of a sampling procedure, to determine the correct amount of credits due. If the total credits due as a result of the recalculation are greater than the credits already granted to dPi, BellSouth should award the necessary additional credits; if they are lower, dPi should reimburse BellSouth for the excess credits it has received.

It was also the Public Staff's view that BellSouth should not be forced to allow promotional pricing for customers that subscribe to blocking services for which no charge is made, including BCR, BRD, and HBG. The Public Staff believes these services did not serve to qualify a customer for BellSouth's promotion and agrees with the Commission's ruling.

dPi Reply Comments

In its Reply Comments, dPi reiterated its comments from its Motion to Reconsider that:

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

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

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission's analysis on Reconsideration addresses the two core issues raised by the reconsideration motion—improper credits for transfers and interpretation of the interconnection agreement:

Improper Credits for Transfers. During the hearing, dPi witnesses Brian Bolinger and Steve Watson responded affirmatively to the following question by dPi's counsel in prefiled rebuttal testimony:

> So in short, this case is reduced to whether dPi is entitled to promotional credits when it orders Basic Service plus Touchstar block features because it has "purchase[d]... BellSouth Basic Service with at least [two] feature[s]" and thus has "qualif[ied] for a waiver of the local service fee." Tpp. 40, 111.

G. S. 62-73 provides that complaints may be made by any person having an interest in any act or thing done or omitted to be done by a public utility that is unjust and unreasonable. The burden of proof with respect to any such complaint shall be upon the Complainant to show that the public utility's rates, service, classification, rule, regulation or practice is unjust and unreasonable. G.S. 62-75. In this case, dPi has the burden to demonstrate to this Commission by the greater weight of the evidence that BellSouth's determination of the credits due to dPi was unjust and unreasonable.

In this case, BellSouth Witness Pat Tipton testified that BellSouth employed two procedures to determine transfer – related credits due to dPi. First, BellSouth sampled end user accounts submitted for promotional billing credit to determine if they would qualify for the promotion in question. If, during the course of review, BellSouth determined that a portion of the accounts did not qualify, BellSouth applied the resulting percentage of qualified accounts to the total credit amount requested to determine dPi's credit amount. Tp. 201. BellSouth issued credits to dPi based on the results of this sampling process for each month of the 22 month promotional period. Tp. 204, dPi Exh 4.

In the second procedure, BellSouth enlisted the services of Dr. Joseph B. Thomas, PhD in statistics, to develop a sampling procedure for the North Carolina accounts for which dPi was claiming promotional credits. Dr. Thomas determined the sample sizes for dPi promotional requests that would determine a statistical accuracy of 95% and a precision of +/- 5%. When applied to the LCCW credits requested by dPi, Dr. Thomas found that 64% of the North Carolina credits applied for by dPi did not qualify for the promotion. This result, when the margin of error is considered, compared favorably with the 66% denial rate that BellSouth actually utilized when denying dPi promotional requests based on the previously described sampling process. Tp. 206.

During the hearing, BellSouth contended that it was not required to examine each account submitted to determine if the accounts qualified for promotional credits. According to BellSouth, such verification is neither necessary nor required. Rather, in BellSouth's view, examination of a representative sample of the accounts submitted is a suitable substitute for determining the amount of credits due. Under those circumstances, one cannot expect that the numbers provided by BellSouth will correspond precisely with the actual numbers derived after an actual examination of the credit requests for each month. At best, the numbers can merely approximate, within a range, the numbers predicted by the sampling process employed by BellSouth and verified by Dr. Thomas. BellSouth contends and the Commission concludes that the sampling process employed by BellSouth was statistically valid.

According to dPi, the process employed by BellSouth resulted in dPi being shortchanged in the amount of $2,537.70. dPi now asks this Commission to award it additional credits in that amount. In support of this request, dPi noted that its review of the BellSouth sampling data revealed denials for the months of June, August and November, 2005 which were significantly higher than industry and company expected denials for transfers. These results led dPi to question the validity of the data derived from these samples and caused dPi to perform an audit of those months. The audit revealed the denial percentages derived from the audits' actual numbers were substantially less than the denial percentages derived from sampling.

dPi now contends that it did not receive credits that it was due because the sampling process utilized by BellSouth was flawed. We are not persuaded from the evidence provided by dPi that BellSouth's approach to calculating credits due yielded incorrect results and is therefore unjust or unreasonable.

In this case, BellSouth determined credits for dPi based on the sampling process described by Witness Tipton and validated by Dr. Thomas for each of the 22 months of the promotional period. dPi chose not to examine the results derived from this sampling process for 19 of the 22 months for which the promotion operated. That is, dPi did not audit each credit request submitted for the entire 22 months for which the promotion was featured, and the credits were calculated to reach this conclusion. Nor did dPi perform an audit for each of the 12 months in which the sample indicated that a transfer request was denied. Either audit would have been invaluable in determining whether the sampling process provided a realistic assessment of transfer based denials.

Instead of auditing the submittals in the manner previously suggested, dPi picked those months for audit which had extremely high denial rates for transfers and offered the most opportunity for errors favorable to dPi, and did not audit those months which had low or zero denial rates because of transfers which, presumably, would yield results more favorable to BellSouth. dPi's method of calculating the credits it was due was inherently flawed and does not account for those months in which the denial rate, as determined by the sample, was low or nonexistent; nor does it indicate if the denial rates derived from the sample for other reasons were inaccurate. As a result, we have no way of knowing if the sampling process employed by BellSouth is in error or if the abnormally high deviations are no more than an anomaly in the statistically accurate sampling process.

Stated more simply, we are unable to tell from this data whether the $2,537.70 deviation identified by dPi is offset by a similar deviation in the remaining 19 months of the promotion period in favor of BellSouth. Thus, even if we accept that those three months produced a discrepancy of $2,537.70, we cannot determine by the greater weight of the evidence that the "error" requires an adjustment to dPi's account because dPi has not proven that the discrepancy has not been offset at some other point in BellSouth's statistically valid sample. Thus, dPi has not met its burden of proving by the greater weight of the evidence that the result reached by BellSouth's sampling process is unjust or unreasonable. Therefore, dPi's request for additional credits must be denied.

Interconnection Agreement Interpretation. On June 7, 2006, the Commission issued an Order Denying dPi's Complaint against BellSouth to recover credits which it alleged had been wrongfully denied. In the Order, we stated:

> Under the clear language of this provision, promotions are only available if end users would have qualified for the promotion if the promotion had been provided by BellSouth directly. In Witness Tipton's testimony, she stated emphatically that BellSouth does not authorize promotional discounts to its End Users who only order basic services and the blocks provided by dPi. This fact was uncontested by dPi at the hearing and unrebutted in its post hearing brief. Thus, under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are not eligible for the credits because similarly situated BellSouth End Users are not entitled to such credit. dPi's complaint should therefore be denied.

In its Motion for Reconsideration, dPi argues that the Commission's decision in this case rests upon the Commission's failure to accurately apply a provision of the parties' interconnection agreement which states:

> "Where available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly."

dPi argues that the Commission was required to interpret the promotion to determine whether the end-user would have qualified for the promotion. The argument that dPi is now making is identical to the argument that it made in the hearing and in the post hearing brief. In our Order of June 7th, we expressly rejected this approach. We stated that "the Commission concludes that we are not required to analyze and decide this case based on the language of the promotion. The fact is that BellSouth and dPi jointly agreed to methodology for determining the limits of any promotion in their voluntarily negotiated interconnection agreement." (emphasis in original) Further, we stated "Under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are *not* eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits." (emphasis in original) Although dPi challenges the credibility of the testimony offered by BellSouth concerning the manner in which BellSouth applies the promotion in question to its own customers, nothing in the record suggests that BellSouth applies the promotional language in any manner other than that described by BellSouth's witness. As a result, dPi has not offered any persuasive rationale that would lead this Commission to overturn its original determination in this regard. For that reason, dPi's motion to reconsider this issue is denied.

IT IS, THEREFORE, SO ORDERED that:

1. dPi's motion for the Commission to award it additional credits in the amount of $2,537.70 be denied.

2. dPi's motion to reconsider the Order of June 7, 2006 be denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of October, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Lh101206.01

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Motion to Appoint a Hearing Officer to Establish a Procedural Schedule in Docket No. 2005-358-C to be served upon the following on November 7, 2006.

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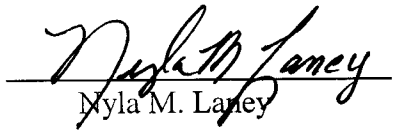

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