

ORIGINAL

Timolyn Henry

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Thursday, March 09, 2006 1:09 PM
To: Filings@psc.state.fl.us
Subject: 050119-TP/050125-TP BellSouth Telecommunications, Inc.'s Motion to Strike
Importance: High
Attachments: Transit_.pdf

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B. Docket No. 050119-TP: Joint Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications of the South, LLC ("Joint Petitioner") objecting to and requesting suspension of Proposed Transit Traffic Service Tariff filed by BellSouth Telecommunications, Inc.

Docket No. 050125-TP: Petition and complaint for suspension and cancellation of

Transit Traffic Service Tariff No. FL 2004-284 filed by BellSouth Telecommunications, Inc. by AT&T Communications of the Southern States, LLC

C. BellSouth Telecommunications, Inc.
on behalf of Manuel A. Gurdian

D. 9 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc.'s Motion to Strike

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March 9, 2006

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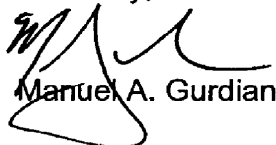
Re: Docket No. 050119-TP: Joint Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications of the South, LLC ("Joint Petitioner") objecting to and requesting suspension of Proposed Transit Traffic Service Tariff filed by BellSouth Telecommunications, Inc.

Docket No. 050125-TP: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL 2004-284 filed by BellSouth Telecommunications, Inc. by AT&T Communications of the Southern States, LLC

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion to Strike, which we ask that you file in the captioned dockets.

Sincerely,


Manuel A. Gurdian

Enclosures

cc: All Parties of Record
Jerry Hendrix
R. Douglas Lackey
Nancy B. White

DOCUMENT NUMBER-DATE

02033 MAR-9 8

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket Nos.: 050119-TL and 050125-TP;
Consolidated Pursuant to Order No.: PSC-05-0517-PAA-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and U.S. Mail this 9th day of March, 2006 to the following:

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Manuel A. Gurdian

(+) Signed Protective Agreement

4. FCTA failed to pre-file direct testimony. Portions of FCTA's rebuttal testimony go well beyond the appropriate scope of rebuttal testimony and contain arguments and analysis that should have been part of FCTA's case-in-chief, i.e. direct testimony.

5. FCTA is improperly and belatedly attempting to expand their own direct case by masquerading previously undisclosed analysis and testimony as "rebuttal" testimony.

6. This practice is unfair and prejudicial to all parties and is an impermissible expansion of the role and purpose of rebuttal testimony.

7. The purpose of rebuttal evidence is to "explain, repel, counteract, or disprove the evidence of the adverse party." *United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978).

8. It is well settled that rebuttal testimony should be limited in its response to the issues that were brought out by the opposing party's direct case:

Generally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have been properly submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such facts are required by the new matter developed by the defendant. (Emphasis added).

Driscoll v. Morris, 114 So.2d 314, 315 (Fla. 3d DCA 1959).

9. Contrary to the well recognized parameters for rebuttal, there are numerous portions of FCTA's rebuttal testimony which do not respond to any specific assertions set forth by BellSouth, or any party, in its direct testimony, but instead raise new analyses and arguments that are intended to bolster FCTA's claims and should have been submitted as part of their case-in-chief.

10. Specifically, Mr. Wood's testimony on page 6, lines 20-23 to page 11, line 20 and page 37, line 9 to page 43, line 20 is not rebuttal testimony.

11. With regard to Mr. Wood's testimony on page 37, line 9 through page 43, lines 20, Mr. Wood goes through each issue and sets forth the FCTA's position on same, just as a witness would normally do in direct testimony; however, Mr. Wood does not "rebut" any direct testimony.

12. With regard to the testimony on page 7, line 9 through page 11, line 20, Mr. Wood sets forth the FCTA's general policy position and recommends that the Commission take certain positions; however, no where does Mr. Wood "rebut" any direct testimony filed by any of the parties.

13. The filing of direct testimony after the deadline imposed by the Prehearing Officer is improper and violates the Order Establishing Procedure. The FCTA's end around of the Commission's Order should not be permitted by the Commission.

14. The Prehearing Officer before whom a case is pending may issue any order necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case. Rule 28-106.211, Florida Administrative Code.

15. The relief requested by BellSouth through this motion, specifically that certain portions of FCTA's rebuttal testimony be stricken, is supported by Commission precedent. In Order No. PSC-00-1779-PCO-SU, issued September 29, 2000, in Docket No. 991643-SU – *In re: Application for increase in wastewater rates in Seven Springs in Pasco County by Aloha Utilities, Inc.*, the Prehearing Officer agreed with the utility that portions of the Office of Public Counsel's ("OPC") testimony did not constitute proper

rebuttal testimony and granted the utility's motion to strike those portions of the purported rebuttal testimony. In granting the utility's motion to strike, the Prehearing Officer stated:

Upon consideration, I find that Mr. Bidy's preferred rebuttal testimony is direct testimony that OPC could have or should have filed in its direct testimony. The used and useful calculation and the issue of infiltration and inflow have been identified as issues in this proceeding and should have been addressed in OPC's direct testimony. Therefore, Aloha's Motion to Strike "Rebuttal" Testimony is hereby granted.

Order, at page 2.

16. Similarly, in Order No. PSC-00-0087-PCO-WS, issued January 10, 2000, in Docket No. 960545-WS – *In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County*, the Commission granted a motion filed by the Interveners to strike testimony filed by the utility that had been styled as rebuttal testimony, but did not rebut any of the parties' testimony, was not cumulative to any other testimony, and was therefore, not proper rebuttal testimony and exhibits.

17. Undersigned counsel has conferred with counsel for the FCTA, and FCTA's counsel objects to the present motion.

WHEREFORE, for the foregoing reasons, BellSouth Telecommunications, Inc. respectfully requests that the Prehearing Officer issue an Order striking page 7, line 9 through page 11, line 20 and page 37, line 9 through page 43, line 20 of Don Wood's Rebuttal Testimony.

Respectfully submitted this 9th day of March, 2006.

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