



Florida Cable Telecommunications Association

Steve Wilkerson, President

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VIA HAND DELIVERY

March 16, 2006

Ms. Blanca S. Bayo, Director
Director, Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 050119-TP & 050125-TP

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and 15 copies of the Florida Cable Telecommunications Association's Response in Opposition to BellSouth's Motion to Strike.

Copies of the Response have been served on the parties of record pursuant to the attached certificate of service. Please acknowledge receipt of filing of the above by stamping the duplicate copy of this letter and returning the same to me.

Thank you for your assistance in processing this filing. Please contact me with any questions.

Sincerely,

Michael A. Gross
Vice President, Regulatory Affairs &
Regulatory Counsel

MAG/mj

Enclosure

cc: All Parties of Record

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FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been served upon the following parties by electronic and U.S. Mail this 16th day of March 2006.

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Michael A. Gross

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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, concerning BellSouth
Telecommunications, Inc.'s Transit Service
Tariff

Docket No. 050119-TL

Petition and Complaint of AT&T Communication
of the Southern States, LLC for suspension and
cancellation of Transit Traffic Service Tariff
No. FL2004-284 filed by BellSouth
Telecommunications, Inc.

Docket No. 050125-TP

Filed: March 16, 2006

**RESPONSE OF THE FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION, INC. IN OPPOSITION TO BELLSOUTH'S
TELECOMMUNICATIONS, INC.'S MOTION TO STRIKE**

The Florida Cable Telecommunications Association, Inc. (FCTA, pursuant to Rule 28-106.204, Florida Administrative Code, files its Response in Opposition to the motion of BellSouth Telecommunications, Inc. (BellSouth) to strike certain portions of the Rebuttal Testimony of Don Wood that was filed by the FCTA on January 30, 2006 and states:

I. Background

On February 11, 2005, a coalition of small LECs filed a joint petition that objects to and requests suspension and cancellation of BellSouth's General Subscriber Services Tariff A16.1, Transit Traffic Service. Docket No. 050119-TP was established in response to the petition filed by the Joint Petitioners. On February 17, 2005, AT&T also

filed a petition and complaint for a suspension and cancellation of Transit Traffic Tariff number FL 2004-284 filed by BellSouth. Docket No. 050125-TP was subsequently established in response to AT&T petition. Both dockets have been consolidated.

On December 6, 2005, the Order Establishing Procedure, Order No. PSC-05-1206-PCO-TP (Order) was issued by the Prehearing Officer. Among the controlling dates established to govern the key activities of this case, direct testimony and all exhibits was to be filed on December 19, 2005, and rebuttal testimony and all exhibits was to be filed on January 30, 2006. The Order did not, as may be implied in paragraphs 2 and 3 of BellSouth's Motion to Strike, specifically provide that the direct testimony was to set forth the parties' respective cases in chief, or that the rebuttal testimony was intended to give the parties an opportunity to respond to the prefiled direct testimony. Indeed, on page 2, the Order provided, "[p]refiled testimony and prehearing statements shall address the issues set forth in Attachment A". The legal underpinnings of direct and rebuttal testimony are established by the Florida Rules of Evidence and applicable case law.

The FCTA initially retained Don J. Wood to serve as a consultant and expert witness in this docket on January 11, 2006. Accordingly, the FCTA filed a Petition to Intervene on January 13, 2006, and Order No. PSC-06-0071-PCO-TP granting intervention to the FCTA was issued on January 30, 2006. The FCTA filed the rebuttal testimony of Don J. Wood on its behalf on January 30, 2006. Thus, the FCTA retained an expert, filed its Petition to Intervene, and was granted intervention a substantial period of time after the deadline for filing direct testimony.

II. BellSouth's Motion to Strike Insufficient on its Face

BellSouth as the movant, has the burden to show precisely why the FCTA's testimony is not proper rebuttal testimony. Far from meeting that burden, BellSouth's motion consists of nothing more than self serving, conclusory statements suggesting that certain testimony is improper, but with utterly no analysis or arguments addressing the claimed impropriety of any specific testimony. The motion is devoid of any attempt to delineate the substance of specific direct testimony in order to explain how specific rebuttal testimony fails to respond to the direct testimony. References to legal standards for rebuttal testimony are merely recited in the abstract without any context or specific reference to the substance of the testimony claimed to be improper. This approach puts the FCTA in the untenable position of guessing at what BellSouth considers improper and requires the FCTA to prove a negative. Consequently, BellSouth's Motion to Strike should be summarily denied based on the insufficiency of the motion on its face.

Essentially, the thrust of BellSouth's motion consists of a reference to blocks of testimony contained in 5 pages in one instance and 6 pages in another instance. BellSouth's argument is that the blocks of testimony cited constitute improper rebuttal testimony solely on the basis that BellSouth says it is so, in the complete absence of any argument, analysis or comparison of the actual testimony contained in the direct testimony and the rebuttal testimony. Mr. Wood's rebuttal responds to the positions taken by BellSouth and the Small LECs in their direct testimony. Prior to Mr. Wood's review of that testimony, he could not have anticipated BellSouth's theory of its case or how BellSouth would attempt to defend its transit tariff, nor the Small LECs' theory of their case or how the Small LECs would defend their position that they did not have an obligation, as an originating carrier, to compensate BST for performing a transit function.

Page 6, line 20 through p. 11, line 20 represents a summary of Mr. Wood's conclusions based on his review of the BST and Small LEC direct testimony. The FCTA is not aware of any requirement that a summary of the conclusions reached in rebuttal testimony (whether or not presented in the form of recommendations to the Commission) must include all of the specific citations to the direct testimony of other parties contained elsewhere in the testimony.

While a party's statement of position on identified issues is often contained in direct testimony, it is not required. In this proceeding these statements of position are often directly related to the positions of BellSouth and the Small LECs taken in their direct testimony, and could not have been anticipated and presented in direct testimony by the FCTA. At a minimum, it would have been necessary to revise the statements of position to reflect the direct testimony of the other parties, and this revised statement of issues would properly be included in rebuttal. Moreover, the Order Establishing Procedure, as stated earlier, provides on page 2 that prefiled testimony, (without specific reference to either direct or rebuttal testimony), and prehearing statements shall address the issues set forth in Attachment A to the Order. The Order on page 5 in the section, "Prehearing Procedure: Waiver of Issues", permits a party to raise issues and take a position on those issues at any time prior to the issuance of the Prehearing Order or as a practical matter, up to and including the day of the Prehearing Conference. Third, Mr. Wood's statement of the FCTA's positions on identified issues also serves to explicate the FCTA's positions inherent in the testimony that precedes it.

BellSouth contends that the FCTA's Rebuttal Testimony is unfair and prejudicial to all parties. However, BellSouth fails to explain specifically how the FCTA's Rebuttal

Testimony is unfair nor the manner in which BellSouth is prejudice by this testimony. The potentiality that the FCTA's Rebuttal Testimony may effectively refute BellSouth's position in this docket does not render the testimony improper. Indeed, BellSouth took the deposition of Don Wood on March 14, 2006, and interrogated Mr. Wood extensively about his testimony, including substantial portions of the testimony which BellSouth claims is improper rebuttal.

III. Detailed Analysis Demonstrating that the FCTA has Filed Proper Rebuttal Testimony

The following is a detailed analysis identifying specific testimony by page and line number as to the manner in which the specific rebuttal testimony of Don Wood responds to specific testimony of Steve Watkins and Kenneth Ray McCallen.

Specific references:

Wood Testimony:

p. 6, ℓ20 – p. 8, ℓ7; p. 9, ℓ4 – p. 10, ℓ 2; and p. 10, ℓ 14 – p. 11, ℓ 20.

Responds to:

McCallen p. 4, ℓ6 – p. 8, ℓ4; p. 9, ℓ7 – p. 10, ℓ4; p. 15, ℓ 4 – p. 15, ℓ 17; p. 16, ℓ17 – p. 17, ℓ10; Watkins p. 4, ℓ5 - ℓ6; p. 6, ℓ 14 – p. 8, ℓ22; p. 15, ℓ 14 – p. 16, ℓ14; p. 17, ℓ - p. 18, ℓ13; p. 42, ℓ14 – p. 43, ℓ2.

Wood Testimony:

p. 8, ℓ8 - ℓ14.

Responds to:

McCallen p. 10, ℓ6 – p. 11, ℓ8; p. 13, ℓ19 – p. 14, ℓ12; p.17, ℓ12 – p. 18, ℓ 10; Watkins p. 9, ℓ 1 – p. 12, ℓ14; p. 35, ℓ18 – p. 36, ℓ6.

Wood Testimony:

p. 8, ℓ15 - ℓ18.

Responds to:

Watkins p. 4, ℓ9 – p. 5, ℓ7; p. 12, ℓ 17 – p. 14, ℓ5; p. 24, ℓ18 – p. 35, ℓ12;

Wood Testimony:

p. 8, ℓ19 – p. 9, ℓ 2; p. 10, ℓ3 - ℓ13.

Responds to:

McCallen p. 11, ¶13 - ¶16; p. 18, ¶12 – p. 19, ¶ 14; Watkins p. 24, ¶3 – ¶11; p. 46, ¶10 – p. 48, ¶2.

The above analysis, without more, unequivocally demonstrates the manner in which Don Wood's Rebuttal Testimony rebuts the testimony of Steve Watkins and Kenneth R. McCallen. This is the type of analysis that BellSouth should have performed before filing its non-meritorious Motion to Strike.

IV. Legal Analysis Supporting the Propriety of the FCTA's Rebuttal Testimony

The case law addressing the principles underlying rebuttal testimony most often occur within the context of a civil or criminal proceeding in a judicial forum. The cases cited in the discussion that follows show that in a judicial forum rebuttal testimony becomes an issue in a context that is significantly different as a matter of the procedure, structure, and order of events in a civil proceeding, from the context in which rebuttal testimony arises in a Commission proceeding. In a civil proceeding, for example, the mode and order of presentation requires a plaintiff to go first, the defendant to go second, and with rebuttal to follow within the sound discretion of the trial judge. According to Ehrhardt, the process works in the following manner:

Rebuttal evidence is offered after the defense has rested its case and is directed to refuting the evidence introduced by the defendant, unless the court exercises its discretion under section 90.612(1) to permit broader proof. For example, evidence that refutes the defense theory or impeaches a defense witness is normally a proper subject for a rebuttal. However, evidence that is merely cumulative of evidence introduced during the case-in-chief may be excluded. The court's decision of whether rebuttal evidence is appropriate is within the court's discretion. [footnotes omitted].

Florida Evidence, 2005 Edition, Charles W. Ehrhardt, Section 612.5 Rebuttal Testimony, pages 587 and 589. In the current Commission docket, as is commonly the case, all parties whether aligned or not, filed their direct testimony simultaneously and their rebuttal testimony simultaneously. The Florida Third District Court of Appeal has explained the general principles applicable to rebuttal testimony as follows:

A trial court has broad discretion to admit rebuttal testimony. However, a trial court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. Therefore, expert rebuttal testimony contradicting a defense theory of the case is not cumulative where plaintiff does not present any expert testimony in her case-in-chief.

Here the expert testimony was not cumulative. Mendez did not present any expert testimony in her case-in-chief. Mendez was only required to establish a prima facie case of liability, not to anticipate and disprove the defendant's potential theory of the case.

Mendez v. John Caddell Constr. Co., 700 So.2d 439, 440-441 (Fla. 3d DCA 1997).

Further, the fact that a plaintiff could have presented its expert during its case-in-chief, but chose not to do so does not make the rebuttal improper. *Zanoletti v. Norle Props. Corp.*, 688 So.2d 952, 953-954 (Fla. 3d DCA 1997). A plaintiff has no obligation to anticipate the defendant's theory of the case and present evidence during the case-in-chief to disprove that theory. *Id.* In both the *Mendez* and *Zanoletti* cases, the rebuttal could not have been cumulative, since in neither case did the plaintiff present any expert testimony in its case-in-chief. Similarly, Mr. Wood's testimony necessarily cannot be cumulative, since the FCTA intervened well after the date that direct testimony was due, and consequently did not file direct expert testimony. The general rule for expert rebuttal testimony does not stand for the proposition that the plaintiff must disprove all

anticipated defenses in its main case. That is exactly what rebuttal is supposed to accomplish. *Heberling v. Fleisher*, 563 So.2d 1086, 1087 (Fla. 4th DCA 1990). All that is required is that the testimony of the defendant “opened the door” for the plaintiff to impeach the testimony by rebuttal testimony. *Parker v. State*, 641 So.2d 483, 485 (Fla. 5th DCA 1994).

BellSouth cites the case of the *United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978) for the proposition that the purpose of rebuttal evidence is to “explain, repel, counteract, or disprove the evidence of the adverse party.” However, BellSouth strategically omits the rest of the quote that provides, “if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution ‘accepting the challenge and attempting to rebut the proposition asserted.’” [citation omitted]. In *Delk*, the Court permitted the rebuttal testimony in issue, and interestingly, found that there was no error in allowing on rebuttal that which had been held impermissible in-chief. *Id* at 519.

BellSouth also quotes a passage from *Driscoll v. Morris*, 114 So.2d 314, 315 (Fla. 3d DCA 1959). BellSouth once again omitted a critical portion of the passage which provided as follows:

If the proffered evidence appears to be cumulative rather than rebuttal, **it is within the sound discretion of the trial judge to allow its admission and the exercise of this discretion will not be disturbed on appeal unless it appears to so prejudice the result as to indicate an abuse of discretion. [Emphasis supplied].**

Id at 316. Though the Court found that the rebuttal supplied in the case before it was improper, the Court stated, “[u]pon the state of the record, had the trial judge ruled otherwise, we could not say with any degree of certainty that such would have been an

abuse of discretion.” Id at 316. In essence, the Court found that the judge’s discretion in the case of rebuttal evidence is so broad that it would not have been an abuse of discretion which ever way the judge had ruled.

Another ruling relied on by BellSouth in support of its motion is found 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*, where the Commission granted a motion filed by the Intervenors to strike rebuttal testimony filed by the utility. In this particular *Aloha* docket, the utility attempted to inject into the case the issue of regulatory expense or its recovery for the first time in rebuttal, when the issue was not been previously raised anywhere in the direct testimony of *Aloha* or in the testimony of the Intervenors or Staff. This Commission Order is distinguishable from Mr. Wood’s testimony which clearly does not inject any entirely new issue.

At this juncture, it is necessary for the FCTA to point out a legal error committed by the Prehearing Officer apparently in reliance on the Intervenors misinterpretation of the *Driscoll* decision. In the language quoted from *Driscoll* above, the Court explained that even if the evidence is cumulative rather than rebuttal, it is still within the discretion of the trial judge to allow its admission. The Court was addressing the broad discretion of the trial judge rather than identifying cumulative evidence as an exception to the underlying principles applicable to rebuttal evidence. In the *Aloha* Order, the Prehearing Officer appeared to consider cumulative evidence as weighing in favor of admission when in actuality, the fact that evidence is cumulative rather than proper rebuttal weighs against its admissibility. The Court was only saying that even normally improper cumulative evidence may be admitted within the sound discretion of the trial judge

“unless it appears to so prejudice the result as to indicate an abuse of discretion.” *Id* at 316. As stated earlier in this memorandum, a trial court abuses its discretion when it limits non-cumulative rebuttal that contradicts a defense theory of the case, and the rebuttal testimony is not cumulative where plaintiff does not present any expert testimony in its case-in-chief. The reasoning in *Driscoll* squarely supports the conclusion that Mr. Wood’s testimony is proper under the circumstances of the present docket.

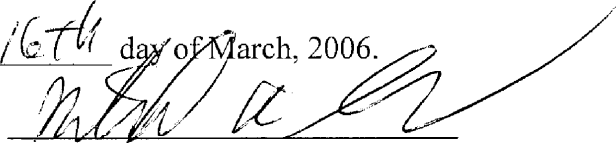
Another Commission Order relied upon by BellSouth in support of its motion is Order No. PSC-00-1779-PCO-SU, issued September 29, 2000, in Docket No. 991643-SU – *In re: Application for increase in wastewater rates in Seven Springs in Pasco County by Aloha Utilities, Inc.*, where the Prehearing Officer granted a motion to strike OPC’s proffered rebuttal testimony. In this particular *Aloha* docket, *Aloha* listed nine examples of the witness’ testimony that *Aloha* claimed was not proper rebuttal. On the contrary, BellSouth, in its Motion to Strike, has failed to list any specific examples of improper rebuttal, resorting instead to generic, conclusory statements. The Prehearing Officer states conclusions in support of her ruling, but does not provide the reasoning by which she arrived at those conclusions. However, it appears that the testimony in controversy did not in fact rebut, but was merely cumulative of the direct testimony. A detailed analysis provided by the FCTA earlier in this memorandum clearly demonstrates the particular testimony of Mr. Wood which responds to the specific testimony of Mr. McCallen and Mr. Watkins.

V. Conclusion

BellSouth’s Motion to Strike portions of Don J. Wood’s Rebuttal Testimony that was filed on behalf of the FCTA on January 30, 2006, should be summarily denied as

insufficient on its face, since it relies solely on self serving conclusions without providing any detailed analysis in support of those conclusions. Secondly, the Motion to Strike should be denied on the basis of the detailed analysis of the rebuttal and direct testimony provided by the FCTA that clearly delineates the direct testimony rebutted by Mr. Wood's testimony. Finally, the Motion to Strike should be denied, since this Commission, as in the case of a trial court, has broad discretion to admit rebuttal testimony. The case law is clear that the FCTA has no obligation to anticipate the respective theories of the case set forth by BellSouth and the Small LECs in their direct testimony and hence, no obligation to present evidence by way of direct testimony to disprove those theories. Further, that is the purpose of rebuttal testimony. The FCTA's Rebuttal Testimony could not have been cumulative where the FCTA did not present any expert testimony in its case-in-chief, i.e., by way of direct testimony.

Respectfully submitted this 16th day of March, 2006.



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