BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by 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 Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc.	DOCKET NO. 050119-TP
In re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC.	DOCKET NO. 050125-TP ORDER NO. PSC-06-0261-PCO-TP ISSUED: March 28, 2006

ORDER GRANTING IN PART, AND DENYING IN PART, BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO STRIKE

This matter is before me on BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Strike portions of the Rebuttal Testimony of Don Wood, the expert witness of the Florida Cable Telecommunications Association (FCTA).

I. Arguments

BellSouth's Motion to Strike

On March 9, 2006, BellSouth filed a Motion to Strike certain portions of FCTA's witness Wood's rebuttal testimony, filed on January 30, 2006. BellSouth asserts that portions of Wood'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 (or direct testimony). BellSouth contends that FCTA is improperly and belatedly attempting to expand its own direct case. BellSouth states that this practice is unfair and prejudicial to all parties and is an impermissible expansion of the role and purpose of rebuttal testimony.

BellSouth asserts that the purpose of rebuttal evidence is to "explain, repel, counteract, or disprove the evidence of an adverse party." United States v. Delk 586 F. 2d 513, 516 (5th Cir. 1978). However, BellSouth believes that 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 of the direct testimony set forth by BellSouth, or any other party. Instead, BellSouth contends these portions raise new analyses and arguments that are intended to bolster FCTA's claims and should be submitted as part of its case-in-chief.

BellSouth states that this Commission's decision 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*, provides guidance in this case. BellSouth states this Commission granted a motion filed by 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. Likewise, BellSouth concludes that certain portions of witness Wood's testimony is improper rebuttal. Thus, BellSouth requests that Wood's rebuttal testimony on page 7, line 9 through page 11, line 20 and page 37, line 9 through page 43, line 20 be stricken.

FCTA's Response in Opposition

On March 16, 2006, FCTA filed its Response in Opposition to BellSouth's Motion to Strike. Therein, FCTA asserts that BellSouth's Motion to Strike 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. FCTA states that witness Wood's testimony responds to the positions taken by BellSouth and the Small LECs in their direct testimony.

FCTA implies that the court has broad discretion in allowing rebuttal testimony into a proceeding. FCTA refers to the Florida Third District Court of Appeal case, which explains the general principles of rebuttal testimony:

> 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 the plaintiff does not present any expert testimony in her case-in-chief.
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> 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 Cadell Constr. Co., 700 So. 2d 439, 440-441 (Fla. 3d DCA 1997). FCTA cites to Zanoletti v. Norle Props. Corp. 688 So.2d 952, 953-954, for the proposition that a plaintiff who could have presented its expert during its case-in-chief, but chose not to do so does not make the rebuttal improper. Thus, FCTA argues that 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.

FCTA further asserts that BellSouth misconstrues its reference to the Delk case. FCTA contends that BellSouth strategically omits a portion of the case's ruling that provides "if the defendant opens to 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] The Delk court allowed the rebuttal testimony in issue to be presented and found there was no error in allowing rebuttal which had been held impermissible in-chief. Id. at 519.

In addition, FCTA notes that BellSouth took the deposition of Mr. 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.

In conclusion, FCTA requests that the prehearing officer deny BellSouth's Motion to Strike because it is insufficient on its face and the prehearing officer has broad discretion to admit rebuttal testimony.

II. Decision & Rationale

Upon review and consideration of both BellSouth's and FCTA's arguments, as well as the direct and rebuttal testimonies referenced in the pleadings, I find it is appropriate and reasonable to grant in part, and deny in part, BellSouth's Motion to Strike. Specifically, BellSouth's request to strike the portions of witness Wood's rebuttal testimony at page 37, line 9 through page 43, line 20 is granted, and BellSouth's request to strike the portions of witness Wood's rebuttal testimony at page 7, line 9 through page 11, line 20 is denied.

* * * * *

It is well-established that an intervening party takes a case as it finds it. FCTA filed for intervention in this consolidated case on January 13, 2006, approximately four weeks after the due date for filing direct testimony, and was granted intervention on January 30, 2006. As stated in the order granting FCTA's intervention, "Pursuant to Rule 25-22.039, Florida Administrative Code, FCTA takes the case as it finds it."[1] On the same date intervention was granted, FCTA filed the rebuttal testimony of witness Don Wood in accordance with the case schedule.

As a general matter, Florida law requires that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible whether or not such evidence would be admissible in a trial in the courts of Florida."[2] Similar to a court's broad discretion in determining whether rebuttal testimony should be admitted into the record (Mendez v. John Cadell Constr. Co., 700 So. 2d 439, 440-441 (Fla. 3d DCA 1997)), presiding officers in Commission proceedings have significant discretion when ruling on motions to strike testimony. Specifically, pursuant to Rule 28-106.211, Florida Administrative Code, "[t]he presiding officer

[1] Order No. PSC-06-0071-PCO-TP, page 1.

[2] Section 120.569(2)(g), Florida Statutes.

before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the process."

While a presiding officer has significant discretion in allowing testimony, the party filing testimony has an obligation to show that the testimony it has presented is legally proper upon a challenge by another party to the case.

Here, BellSouth, a party that filed direct and rebuttal testimony, raised valid arguments as to the proper scope of rebuttal testimony. I agree that rebuttal testimony should be limited in its response to issues brought out by the opposing party's direct case, as stated by Florida's Third District Court of Appeal in Driscoll v. Morris, 114 So. 2d 314, 315 (Fla. 3rd DCA 1959):

> 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.

In its March 16, 2006, Response in Opposition to BellSouth's Motion to Strike, FCTA asserted that witness Wood's statements at issue are responsive to certain portions of the direct testimony of BellSouth witness McCallen and Small LEC witness Watkins.

The question presented is a specific one: do the challenged portions of Mr. Wood's testimony rebut, explain, repel, counteract, or disprove the direct testimony of other witnesses?[3]

The task of distinguishing between genuine rebuttal testimony and direct testimony submitted as rebuttal[4] is made easier when the testimony directly responds to identifiable portions of previously filed direct testimony. Rebuttal witnesses often link questions and answers to the specific page and line numbers of the direct testimony being rebutted; this is a good practice, which perhaps could eliminate disputes such as this one.

Some of Mr. Wood's testimony is clearly rebuttal,[5] while some is just as clearly direct.[6] Some of it, however, is more difficult to treat categorically and therefore more difficult to

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[3] BellSouth's Motion to Strike challenges the testimony as improper rebuttal testimony but does not argue (or waive) some other basis for inadmissibility, such as incompetence, irrelevance, etc.

[4] Testimony submitted as rebuttal but given merely to advance the party's direct case.

[5] This testimony, which is not subject to the Motion to Strike, references the direct testimony being rebutted.

[6] For example, the testimony summarizing FCTA's position on the issues.

declare as *not* rebuttal. One reason for this is that Mr. Wood did not file direct testimony, and thus did not have the foundation other rebuttal witnesses had in shaping their respective rebuttal testimonies. Indeed, in some rebuttal testimony the witnesses summarized their previously filed direct testimony as a predicate for the rebuttal testimony.

With this in mind, some of Mr. Wood's testimony that appears to be direct may have been intended as a predicate for counteracting the previously filed direct testimony, as opposed to argument made merely to advance FCTA's direct case. In an abundance of caution, I choose not to strike this testimony (page 7, line 9 through page 11, line 20). Thus, the Commission will not be precluded from giving this portion of the testimony the weight it is due.

In contrast, FCTA provided not a shred of compelling justification for the portions of witness Wood's testimony at page 37, line 9 through page 43, line 20, the section titled "Response to the List of Tentative Issues." This portion of witness Wood's testimony is procedurally deficient because it does not rebut any specific assertions of direct testimony. Rather, it directly addresses the tentative issues identified in this proceeding,[7] as is typically done in direct testimony.

Rebuttal testimony should not be struck merely because it fails to cite the page and line number of the direct testimony being counteracted. Nevertheless, it is the obligation of counsel to ensure that the format of the rebuttal testimony avoids unnecessary and time consuming disputes such as this one.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. Tew, Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Strike portions of the Rebuttal Testimony filed by witness Don Wood on behalf of the Florida Cable Telecommunications Association is hereby granted in part, and denied in part, as set forth in the body of this Order.

[7] The tentative issues in this docket were identified in Attachment A to Order No. PSC-05-1206-PCO-TP.

By ORDER of Commissioner Katrina J. Tew, as Prehearing Officer, this 28th day of March, 2006.

KATRINA J. TEW
Commissioner and Prehearing Officer

(SEAL)

FRB/KS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.