

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.

DOCKET NO. 030851-TP  
ORDER NO. PSC-04-0154-PCO-TP  
ISSUED: February 16, 2004

Order Granting, In Part, and Denying, In Part,  
BellSouth Telecommunications, Inc.'s  
Motion to Strike Parties' Direct Testimony

**I. Case Background**

In response to the Federal Communications Commission's (FCC) August 21, 2003, Triennial Review Order (TRO), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements. This docket was initiated to implement those provisions of the TRO concerning whether CLECs are impaired without access to unbundled local circuit switching.

All parties filed direct testimony on December 4, 2003. On January 5, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Motion to Strike the direct testimony of Z-Tel Communications, Inc.'s (Z-Tel) witness, Michael Reith, in its entirety, as well as portions of the direct testimony filed by Supra Telecommunications and Information Systems, Inc.'s (Supra) witness, David Stahly. On January 9, 2004, Z-Tel filed its response to BellSouth's motion, and on January 12, 2004, Supra filed its response to BellSouth's motion.

**II. Standard for Granting Motion to Strike Testimony**

Section 120.569(2)(g), Florida Statutes, states 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." Section 90.401, Florida Statutes, states that "Relevant evidence is evidence tending to prove or disprove a material fact." Additionally, Section 90.402, Florida Statutes, maintains that "all relevant evidence is admissible, except as provided by law." However, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence." Section 90.403, Florida Statutes.

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In addition, it has been repeatedly held in both civil actions and criminal prosecutions that a motion to strike the entire testimony of a witness should be denied if any part thereof is admissible for any purpose. Otherwise, the motion should be confined specifically to the inadmissible portions. See Lewis v. State, 55 Fla. 54; 45 So. 998 (1908); Thompson v. State, 52 Fla. 113, 41 South. Rep. 899; Herrin v. Abbe, 55 Fla. 769, 46 South Rep. 183. Further, “a motion to strike out evidence that has been introduced in a case must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that it is not sufficient.” Lewis, 55 Fla. 54; 45 So. 998, 1002 (1908); *citing* Platt v. Rowand, 54 Fla. 237, 45 South Rep. 32.

## **II. BellSouth’s Motion to Strike**

BellSouth argues that portions of Supra witness Stahly’s testimony should be stricken for the following reasons:

- i) Page 6, line 21 through page 10, line 6, because this testimony is merely a purported summary of the Act and Supra’s views on competition;
- ii) Page 11, line 5 through page 13, line 5, because this is merely a recitation of Supra’s alleged grievances against BellSouth;
- iii) Page 13, line 7 through page 14, line 2, because this testimony consists of Supra’s take on the investment market; and
- iv) Page 16, lines 5 through 16, because it consists of Supra’s take on the effect of competition on BellSouth.

BellSouth further argues that Z-tel witness Reith’s testimony should be stricken in its entirety, because it is simply irrelevant. BellSouth claims that Witness Reith’s testimony consists of nothing more than a history of Z-Tel and the services it provides, which has no bearing on the issues to be addressed in this proceeding.

## **III. Responses in Opposition to BellSouth’s Motion to Strike Testimony**

Supra argues that Witness Stahly’s direct testimony is “directly relevant to the issues set forth in the Commission’s November 7, 2003, Order.” Specifically, Supra responds as follows:

- i) Page 6, line 21 through page 10, line 6 is relevant to Issues 2(a) and 2(c);
- ii) Page 11, line 5 through page 13, line 5 is relevant to Issues 2(a), 2(c) and 3;
- iii) Beginning on page 13, line 7 through page 14, line 2 is relevant to Issues 3(f) and 6; and
- iv) Beginning on page 16, lines 5 through 16 is relevant to all matters raised in Issues 3(a)–(f).

Likewise, Z-Tel contends that: 1) Z-Tel's witness details how the company potentially will be affected by explaining Z-Tel's substantial interests and business interests in unbundling; and 2) Z-Tel helps define the relevant markets on page 17, lines 13-14 of Witness Reith's direct testimony. In addition, Z-Tel requests oral argument pursuant to Rule 25-22.058, Florida Administrative Code.

**IV. Decision**

Z-Tel's request for oral argument is denied. I find the pleadings fully address the matters at issue, and, therefore, oral argument will not assist me in consideration of this matter.

After considering all of the above arguments, I hereby grant, in part, and deny, in part, BellSouth's Motion to Strike. Specifically, I find the probative value of portions of Witness Stahly's testimony is substantially outweighed by the prejudicial nature of the testimony. As such, Witness Stahly's testimony on page 11, line 5 through page 13, line 5, shall be stricken. The motion is otherwise denied as it relates to the remainder of Witness Stahly's testimony.


As for Z-Tel, the case law is clear that a motion to strike the entire testimony of a witness should be denied if any part thereof is admissible for any purpose. Otherwise, the motion should be confined specifically to the inadmissible portions. See Lewis v. State, 55 Fla. 54; 45 So. 998 (1908); Thompson v. State, 52 Fla. 113, 41 South. Rep. 899; Herrin v. Abbe, 55 Fla. 769, 46 South Rep. 183. In the case at hand, I find that page 17, lines 13 through 17, of Z-Tel Witness Reith's direct testimony is relevant to the issues in this proceeding. Therefore, the motion as it pertains to Witness Reith's testimony is denied. In reaching this conclusion, I do not reach the question of whether the remainder of Witness Reith's testimony is relevant.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that BellSouth Telecommunication, Inc.'s Motion to Strike is granted, in part, and denied, in part, as set forth in the body of this Order.

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By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 16th  
day of February, 2004.



CHARLES M. DAVIDSON  
Commissioner and Prehearing Officer

( S E A L )

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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.