

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by DPI-Teleconnect, L.L.C.
against BellSouth Telecommunications, Inc.
for dispute arising under interconnection
agreement.

DOCKET NO. 050863-TP
ORDER NO. PSC-07-0788-PCO-TP
ISSUED: September 27, 2007

ORDER DENYING AT&T'S MOTION TO STRIKE AND DENYING
DPI'S MOTION FOR EXTENSION OF TIME
TO RESPOND TO MOTION TO STRIKE

I. Case Background

On November 10, 2005, this docket was established to address dPi-Teleconnect, L.L.C.'s (dPi) complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T) for a dispute arising under its interconnection agreement. Pursuant to Order No. PSC-06-0185-PCO-TP, the docket was held in abeyance from March 8, 2006 through January 4, 2007, at which time an Order Granting Motion to Lift Stay (Order No. PSC-07-0015-PCO-TP) was issued.

On April 13, 2007, Order No. PSC-07-0322-PCO-TP (Order Establishing Procedure) was issued, scheduling the matter for an administrative hearing on July 11, 2007. On May 11, 2007, dPi and AT&T filed a Joint Motion for Continuance, which was jointly withdrawn on June 13, 2007. By Order No. PSC-07-0571-PCO-TP (Order Modifying Procedure), issued July 9, 2007, the hearing was rescheduled to October 1, 2007. On July 20, 2007, dPi filed a Motion for Continuance, which was denied by Order No. PCS-07-0712-PCO-TP.

On August 24, 2007, AT&T filed a Motion to Strike, requesting that portions of dPi's rebuttal testimony be stricken, and that dPi be prohibited from amending its rebuttal testimony. On August 28, 2007, AT&T filed a Notice of Filing Corrected Attachment.¹ On September 5, 2007, dPi filed a Motion for Extension of Time to Respond to AT&T's Motion to Strike and a Response to AT&T's Motion to Strike. On September 7, 2007, AT&T filed a Response in Opposition to dPi's Motion for Extension of Time.

II. AT&T's Motion to Strike

AT&T seeks to strike portions of the prefiled Rebuttal Testimony of Brian Bolinger and Steve Watson on the basis that the language is false. Specifically, AT&T asks that Steve Watson's Rebuttal Testimony, page 5, lines 15 through 18, and Brian Bolinger's Rebuttal Testimony, page 1, line 27 through page 2, line 4, be stricken. AT&T also requests that the Commission preclude dPi from amending its Rebuttal Testimony.

¹ AT&T corrected Composite Attachment 1, which was incomplete as filed due to a technical problem. This attachment was identified in AT&T's Motion to Strike.

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In support of its Motion to Strike, AT&T states that it provided dPi with all discovery responses that are relevant to the issues discussed in dPi witnesses' testimony by August 10, 2007. AT&T further states that dPi failed to request the password protecting the confidential information that had been sent to dPi prior to the rebuttal deadline. AT&T states that the confidential information that it provided is not related to the incomplete areas of dPi's rebuttal testimony, and therefore should not be stated as a basis for dPi witnesses' answers.

In addition, AT&T states that dPi should not be allowed to ignore the rules of the Commission or the requirement of the Order Establishing Procedure that testimony be timely filed. AT&T further states that dPi should not be allowed to avoid the rules by misstating facts in discovery responses regarding AT&T's timely and appropriate responses.

III. dPi's Motion for Extension of Time to Respond to Motion to Strike

In its Motion for Extension of Time, dPi requests that the Commission grant a one-day extension of time to file its response to AT&T's Motion to Strike. In support of its request, dPi states that AT&T's Motion to Strike was amended when AT&T filed its Notice of Filing Corrected Attachment, thereby making the deadline to respond to this Motion September 5, 2007. dPi further states that "in the event that September 4 was the correct response date, dPi's failure to respond was inadvertent and caused by a misunderstanding about the rule."

IV. AT&T's Response in Opposition to dPi's Motion for Extension of Time

In its Response in Opposition to dPi's Motion for Extension of Time, AT&T states that dPi failed to observe Rule 28-106.204(1), F.A.C., which provides that a party "may, within 7 days of service of a written motion, file a response in opposition." AT&T argues that the filing of a printout of a Federal Express receipt by Notice of Filing Corrected Attachment does not rise to the level of amending its Motion to Strike. Further, AT&T states that dPi's request for a Motion for Extension of Time was invalid, as Rule 28-106.204(5), F.A.C., provides that "[m]otions for extensions of time shall be filed prior to the expiration sought to be extended and shall state good cause for the request."

Regarding the matter of calculation of seven days under Rule 28-106.204(1), F.A.C., AT&T cites to Rule 28-106.103, F.A.C. which states:

[i]n computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday.

Based on Rule 28-106.103, F.A.C., AT&T argues that dPi's Response was due on August 31, 2007. dPi however, did not file its Response until September 5, 2007. Accordingly, AT&T requests that the Commission deny dPi's Motion for Extension of Time to Respond to Motion to Strike.

V. Analysis and Ruling

A. dPi's Motion for Extension of Time to Respond to Motion to Strike

Parties appearing before the Commission are governed by, and are expected to observe, the Uniform Rules of Procedure, Chapter 28, F.A.C. Pursuant to Rule 28-106.204(1), F.A.C., when time allows a party may file a response in opposition to a motion within seven days of service. AT&T filed its Motion to Strike on August 24, 2007, thereby making dPi's Response due by August 31, 2007. dPi argues that AT&T's filing of its Notice of Filing Corrected Attachment restarted the time clock of seven days, thereby making dPi's Response due by September 5, 2007.

However, I do not find that the Notice of Filing Corrected Attachment, which added the previously mentioned FedEx receipt, rises to the level of amending AT&T's Response. Even factoring in a restart of the time clock, dPi submitted its Response to Motion to Strike one day beyond the seven day requirement.

According to dPi, if its Response is considered untimely, it asks the Commission to find its action derives from a "misunderstanding of the rule" and, therefore, unintentional. Rule 28-106.204(1), F.A.C., provides that the computation of time does not include the day the motion is received, and that the last day shall be considered as the deadline unless it is a Saturday, Sunday, or legal holiday, in which event the time frame shall run until the end of the next day. Accordingly, seven days from August 28, 2007, would fall on September 4, 2007.

dPi's reasoning that it should be allowed an extension of time based on a misunderstanding of the Commission Rules is not sufficient. Attorneys appearing before the Commission have the duty to know and comply with the Uniform Rules, as well as the applicable specific rules of the Commission. Counsel for dPi has asserted that he is familiar with the rules and regulations governing the Commission.² Therefore, counsel for dPi should have been aware of the computation of time for responses.

Based on my assessment that dPi failed to respond within seven days as required by Rule 28-106.204(1), F.A.C., dPi's Motion for Extension of Time to Respond to Motion to Strike is denied. As such, dPi's Response to Motion to Strike shall not be considered.

B. AT&T's Motion to Strike

In its Motion to Strike portions of the prefiled Rebuttal Testimony of Brian Bolinger and Steve Watson, AT&T cites to Rule 25-22.037(2), F.A.C., as the basis for its motion. This Rule is no longer in effect and is not an enforceable rule of the Commission.³

² Request for naming of qualified representative, with attached affidavit of Christopher Malish filed on March 9, 2007.

³ Rule 25-22.037(1), F.A.C., which provided a time frame for filing answers, was repealed in 1998.

AT&T contends that the rebuttal testimony filed by dPi's witnesses, Brian Bolinger and Steve Watson, includes false statements. AT&T argues that the portions of the testimony regarding AT&T's failure to produce full and complete rebuttal testimony should be removed, as AT&T states that it provided all discovery responses relevant to the issues discussed by the witnesses.

Section 120.569(2)(g), F.S., provides that "[i]rrelevant, 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 its affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." Any allegations by the parties as to the timing and/or receipt of discovery can be addressed by the parties through depositions or cross-examination during the evidentiary hearing. The Commission has the expertise to independently evaluate all evidence entered into the record and to give that evidence the weight it deserves under the circumstances. Thus, at the appropriate time, the Commission will evaluate the rebuttal testimony at issue here and give it the weight it deserves.


Upon consideration, I find it unnecessary to strike any portion of the pre-filed testimony filed by dPi. Although the objected to portions may be immaterial, the Commission is fully capable of placing the challenged testimony in context and assessing its probative value, if any. Accordingly, AT&T's Motion to Strike is denied.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. McMurrin, as Prehearing Officer, that dPi-Teleconnect, L.L.C.'s Motion for Extension of Time to Response to Motion to Strike is denied. It is further

ORDERED that BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Strike is denied.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 27th
day of September, 2007.


KATRINA J. McMURRIAN
Commissioner and Prehearing Officer

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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 Office of Commission Clerk, 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.