

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-07-0820-PCO-TP
ISSUED: October 12, 2007

ORDER DENYING DPI'S MOTION TO STRIKE
TESTIMONY OF PAM TIPTON

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. 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. By Order No. PSC-07-0571-PCO-TP (Order Modifying Procedure), issued July 9, 2007, the hearing was rescheduled to October 1, 2007. AT&T and dPi filed an Emergency Joint Motion for Continuance on September 28, 2007, which was granted by Order No. PSC-07-0814-PCO-TP on October 10, 2007. That Order also established a November 30, 2007 hearing date.

The subject of this order is dPi's September 17, 2007, Motion to Strike Testimony of Pam Tipton (Motion), and AT&T's Response to dPi's Motion to Strike filed September 21, 2007.

II. dPi's Motion to Strike Testimony of Pam Tipton

In support of its Motion, dPi requests that the testimony of Witness Tipton be stricken on the basis that she has no personal knowledge of the facts contained within her testimony. dPi also argues that Witness Tipton is not presented nor qualified as an expert.

dPi asserts that Witness Tipton had no interaction with dPi in the crediting process and that they had not heard of her until she was identified as a witness in the North Carolina proceedings. dPi cites to Section 90.604, Florida Statutes (F.S.), which provides that "a witness may only testify to facts within their personal knowledge." dPi argues that Witness Tipton has gained all knowledge of this matter through conversations with other persons, and therefore, her testimony is based on hearsay. dPi further alleges that Witness Tipton's testimony is "incompetent" pursuant to Rule 28-106.213, Florida Administrative Code (F.A.C.), and Section 90.801, F.S.

dPi contends that it offers witnesses with complete knowledge of the crediting history, while AT&T proffered a witness that can only offer knowledge of selected facts. dPi argues that

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as a result, the Commission will get an incomplete view of the situation due to the disparity of depth between the parties' witnesses. Finally, dPi states that Witness Tipton's testimony is the "worst kind of rank hearsay" and is an example of why hearsay is "specifically disallowed" by Commission rules.

III. AT&T's Response in Opposition to dPi's Motion to Strike

In its Response filed on September 21, 2007, AT&T asserts that dPi's Motion fails to specifically identify which portions of Witness Tipton's testimony it moves to strike. AT&T argues further that dPi does not differentiate between direct or rebuttal testimonies, which prevents any specific discussion of whether or not the testimony is hearsay.

AT&T notes that the Commission has consistently found that the rules of evidence in administrative hearings are liberal. AT&T contends that Witness Tipton's testimony is admissible and cites to Section 120.569(2)(g), F.S. which provides:

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.

Additionally, AT&T cites to Section 90.401, F.S. which states, "[r]elevant evidence is evidence tending to prove or disprove a material fact." AT&T asserts that Witness Tipton's direct and rebuttal testimony is not hearsay and is relevant to the instant docket. In support of its assertion, AT&T contends that Witness Tipton testifies within her personal knowledge on the following issues: her analysis of the Interconnection Agreement, the promotional and tariff language in dispute, her investigation and review of dPi's allegations in its Complaint, the promotional credit validation process, and reviews.

Finally, AT&T contends that Witness Tipton is an expert in the field of interconnection agreements and the disputes that arise out of those agreements. AT&T argues that an expert is permitted to express an opinion on the matters in which the witness has expertise when the opinion is based upon the facts which the expert personally knows, is in response to hypothetical questions, or is in response to facts disclosed to the expert at or before trial. *See* Erhardt, Florida Evidence, (2006 Ed.) Section 702.1, p. 688-89. AT&T notes that it is Commission practice to presume a witness to be an expert in the field in which he or she is testifying and allow the witness to testify to his or her opinion.¹

¹ *See*, Order No. PSC-01-1919-PCO-WU, issued September 24, 2001, in Docket No. 991666-WU, In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation.

IV. Analysis and Ruling

Commission proceedings are conducted pursuant to the Administrative Procedures Act, Chapter 120, F.S. Section 120.569(2)(g), F.S. provides:

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.

dPi has not alleged, nor do I find, that Witness Tipton's testimony is irrelevant, immaterial, or unduly repetitious.

dPi does allege that Witness Tipton's testimony is "rank hearsay" pursuant to Rule 28-106.213(3), F.A.C. However, Rule 28-106.213(3), F.A.C. provides that "[h]earsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, Florida Statutes." Consequently, I do not find it necessary to make a determination as to whether Witness Tipton's testimony is hearsay. Clearly, Rule 28-106.213(3), F.A.C. provides that AT&T may submit hearsay testimony for the purposes of supplementing or explaining other evidence in the record, and the Commission shall afford it the weight it is due.

Finally, dPi asserts that Witness Tipton has failed to be identified as an expert before this Commission. As noted by AT&T, the Commission has consistently held that a witness shall be presumed to be an expert in the field in which he or she is testifying and shall be allowed to give opinion testimony.² Furthermore, dPi will be afforded the opportunity at hearing to fully cross-examine Witness Tipton regarding her knowledge of the facts and circumstances in this proceeding. Upon conclusion of cross-examination of Witness Tipton at the hearing, and upon consideration of her testimony as a whole, the Commission will be able to afford Witness Tipton's testimony the proper weight it deserves.


For the reasons set forth above, dPi's Motion to Strike Testimony of Pam Tipton is denied.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. McMurrian, as Prehearing Officer, that dPi-Teleconnect, L.L.C.'s Motion to Strike Testimony of Pam Tipton, is denied.

² See, Order No. PSC-07-0033-PCO-EU, issued January 9, 2007, in Docket No. 060635-EU- In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 12th
day of October, 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.