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1 BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

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3 DOCKET NO. 050863-TP

4 In the Matter of:

5 COMPLAINT BY DPI-TELECONNECT, L.L.C.

AGAINST BELLSOUTH TELECOMMUNICATIONS,

6 INC. FOR DISPUTE ARISING UNDER

INTERCONNECTION AGREEMENT.

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16 PROCEEDINGS: PREHEARING CONFERENCE

17 BEFORE: COMMISSIONER KATRINA J. MCMURRIAN

Prehearing Officer

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DATE: Tuesday, September 18, 2007

19

TIME: Commenced at 1:38 p.m.

20 Concluded at 3:32 p.m.

21 PLACE: Betty Easley Conference Center

Room 148

22 4075 Esplanade Way

Tallahassee, Florida

23

REPORTED BY: LINDA BOLES, RPR, CRR

24 Official FPSC Reporter

(850) 413-6734

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FLORIDA PUBLIC SERVICE COMMISSION

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1 APPEARANCES:

2 TRACY HATCH, ESQUIRE, AT&T, 101 North Monroe Street,

3 Suite 700, Tallahassee, Florida 32301-1549, appearing on

4 behalf of AT&T Florida.

5 J. PHILLIP CARVER, ESQUIRE, AT&T Florida, c/o Greg

6 Follensbee, 150 South Monroe Street, Suite 400, Tallahassee,

7 Florida 32303-1556, appearing on behalf of AT&T Florida.

8 CHRISTOPHER MALISH, ESQUIRE, Foster Law Firm, 1403

9 West Sixth Street, Austin, Texas 78703, appearing on behalf of

10 DPI Teleconnect, L.L.C.

11 LEE ENG TAN, ESQUIRE, and MARY ANNE HELTON, ESQUIRE,

12 FPSC General Counsel's Office, 2540 Shumard Oak Boulevard,

13 Tallahassee, Florida 32399-0850, appearing on behalf of the

14 Commission Staff.

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1 P R O C E E D I N G S

2 COMMISSIONER McMURRIAN: Call this prehearing to

3 order. Staff, please read the notice.

4 MS. TAN: Pursuant to notice issued August 31st,

5 2007, this time and place has been set for an administrative

6 hearing in Docket Number 050863, complaint by dPi Teleconnect,

7 L.L.C., against BellSouth Telecommunications, Inc., doing

8 business as AT&T, for dispute arising under interconnection

9 agreement.

10 COMMISSIONER McMURRIAN: And now we'll take

11 appearances.

12 MR. HATCH: Tracy Hatch appearing on behalf of AT&T

13 Florida, along with Phil Carver, also appearing on behalf of

14 AT&T Florida.

15 MR. MALISH: Good afternoon. It's Chris Malish with

16 Foster, Malish, Blair & Cowan on behalf of dPi. And I have

17 counsel and vice president for dPi, Brian Bolinger, with me.

18 MS. TAN: And Lee Eng Tan for Commission staff.

19 COMMISSIONER McMURRIAN: Okay. Mr. Bolinger is a

20 witness too; right? Am I correct?

21 MR. MALISH: Mr. Bolinger is indeed a witness.

22 COMMISSIONER McMURRIAN: Okay. Staff, are there any

23 preliminary matters we need to address before we address the

24 Prehearing Order?

25 MS. TAN: There are none.

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1 COMMISSIONER McMURRIAN: Okay. We'll go through the

2 Draft Prehearing Order now. Well, do the parties have any

3 preliminary matters?

4 We'll go through the Prehearing Order at this time.

5 I'll identify the sections, and I want the parties to let me

6 know if there are any corrections or changes to be made. We

7 may go through certain sections quickly, so please speak up if

8 you have any changes or corrections to make me aware of.

9 Section I, case background, Page 1.

10 Section II, the conduct of proceedings.

11 Section III, jurisdiction.

12 Section IV, procedure for handling confidential

13 information.

14 Hearing none, Section V, prefiled testimony and

15 exhibits and witnesses. One thing I'll note under that section

16 is five minutes is typically provided for witness summaries of

17 testimony. Do the parties want to shorten or dispense with

18 witness summaries or --

19 MR. CARVER: We would like to have witness summaries.

20 COMMISSIONER McMURRIAN: Okay.

21 MR. MALISH: And you normally allocate five minutes

22 to that per witness?

23 COMMISSIONER McMURRIAN: Five minutes per witness.

24 MR. MALISH: That's fine.

25 COMMISSIONER McMURRIAN: Okay. Section VI, order of

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1 witnesses. At this point I probably should ask, are the

2 parties willing to stipulate any witnesses at this point?

3 Hearing none. I also should ask whether the direct and

4 rebuttal testimony can be taken up together. Do the parties

5 have thoughts on that?

6 MR. CARVER: That's acceptable to AT&T.

7 MR. MALISH: We would recommend it.

8 COMMISSIONER McMURRIAN: You would recommend it?

9 MR. MALISH: Yes.

10 COMMISSIONER McMURRIAN: Okay. Okay. Then we will

11 show that in the final order.

12 Okay. Section VII, basic positions, any changes?

13 MR. CARVER: May I ask a question before we get to

14 Section VII?

15 COMMISSIONER McMURRIAN: Sure.

16 MR. CARVER: And I apologize if I missed a section.

17 But will there be opening statements at the hearing?

18 COMMISSIONER McMURRIAN: Yes. And I think that we

19 usually address that at the end in the ruling section, but we

20 can talk about it now.

21 MR. CARVER: Oh, sorry. Okay.

22 COMMISSIONER McMURRIAN: I think what we have in the

23 draft is ten minutes, and we might as well take it up now. Do

24 you -- is that sufficient?

25 MR. CARVER: Yes, I think that's sufficient.

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1 MR. MALISH: Actually, you may not, may or may not be

2 aware, but we've done this case, at least one precursor to this

3 case in North Carolina, and I believe openings there took, and

4 they were useful, but I believe they took approximately 18 to

5 20 minutes at least on our side, a PowerPoint and stuff like

6 that to help sort of paint a big picture.

7 MR. CARVER: If I may, I mean, it's a one- or perhaps

8 two-issue case, it's really not that complicated, and we

9 believe ten minutes is sufficient.

10 COMMISSIONER McMURRIAN: Maybe we'll bring this back

11 up at the end because we probably need to talk about how many

12 issues we are dealing with. So we'll bring that back up at the

13 end.

14 Section VIII, issues and positions on Page 5. Any

15 changes or corrections or objections to any of the issues?

16 It's probably a good time to talk about Issue 2. As I

17 understand it, the parties were discussing possibly trying to

18 negotiate something about Issue 2. And I'll give each you of

19 an opportunity to address it, but have you been able to reach

20 any kind of agreement as to Issue 2?

21 MR. CARVER: No, we have not. And I think what it

22 comes down to is really sort of a question about the

23 circumstances under which an issue can be dropped from a

24 proceeding. And if I, if I may just explain briefly the

25 situation we have.

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1 When dPi originally filed their complaint, they

2 identified four promotions. And one of those which had to do,

3 which is called CRACKS (phonetic), sort of dropped out because

4 that has essentially been resolved. So there were three

5 remaining issues. The line connection charge issue is Issue

6 1 and the two other issues are Issue 2. When -- and these were

7 identified, you know, as issues for the proceeding.

8 DPi chose not to address those in their testimony and

9 they have now taken the position that they want to drop it from

10 the case. And we don't have a problem with that, but our

11 position is if they drop it from the case, then it should be

12 dropped with prejudice. Because basically under the

13 interconnection agreement between the parties, when we bill dPi

14 for something, they can dispute it and then there's a dispute

15 resolution process. These promotions that are addressed in

16 Issue 2, like the one in Issue 1, have been the subject of

17 disputes and, as a result of that, they've not paid for --

18 well, let me back up a bit. They take the promotional credits

19 and they offset it against their bill. So this represents

20 money that's not been paid for, in some instances, four or five

21 years. This complaint was filed two years ago and a resolution

22 on both the Issue 1 promotion and on the Issue 2 and 3

23 promotion have been pending for that entire time. That's why

24 we filed testimony on it because we thought this was going to

25 be dPi's day in court.

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1 Our concern is if they drop Issue 2 out at this

2 juncture, then when we get ready to basically rebill them and

3 try to collect the money, then they're going to come back and

4 say, no, sorry, these are disputed and they were removed from

5 the case without prejudice so, therefore, you know, we don't

6 have to pay. And in the context of our discussions earlier

7 today when we were trying to work out the stipulation, I think

8 it became clear that that's exactly what they plan to do.

9 So our position is now that this has been pending

10 before the Commission for two years and we've delayed

11 collection efforts for two years. You know, this is, so to

12 speak, their day in court. If they don't want it, that's fine,

13 but in that instance it should be dismissed with prejudice. We

14 should not have to refile and relitigate disputed amounts that,

15 again, in some instances the disputed debt is as much as four

16 years old. Their position, as I understand it, is that they're

17 free to dismiss it if they want with no restrictions and then

18 we have to begin the process all over again.

19 So I don't think we have a dispute about whether or

20 not it should come out, it's just the circumstances under which

21 it, you know, would come out.

22 COMMISSIONER McMURRIAN: Mr. Malish, I'm sure you

23 want to respond to that. I did see in some of your filings

24 where you alluded to not wanting to litigate Issue 2 and had

25 heard that you all were working on something. Is the source of

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1 the controversy the with or without prejudice, is that --

2 MR. MALISH: Exactly. To give you some background,

3 as you know, these promotion disputes are just not in Florida,

4 they're basically BellSouth territory-wide. And when the

5 dispute for all states was initiated or basically came to a

6 head there were the three main promotions: LCCW, line

7 connection charge waiver, the SSCW, basically the other two in

8 Issue Number 2. After this case was filed in North Carolina,

9 BellSouth paid almost 100 percent of the issues that were, were

10 the promotions that are included in Issue Number 2. And by the

11 time we went to, went through discovery in North Carolina, it

12 was literally 1 percent or less of the total amount in dispute.

13 So it was approximately like one or two thousand dollars out of

14 a hundred and some odd thousand dollars worth of disputes. And

15 so basically it didn't, it didn't make economic sense to spend

16 $5,000 or $10,000 litigating a $1,000 issue, and nor is that

17 something that we wanted to dump on the Commission.

18 In Florida we did not -- because we don't know until

19 they tell us what disputes are being paid and which ones

20 aren't, because we don't know the answer to those questions

21 until we go through the discovery, we weren't able to narrow

22 the issues in Florida until we got that discovery back from

23 them. And so here in Florida the percentage is bigger than it

24 is in North Carolina, but, on the other hand, the total dollar

25 amount in dispute is, is significantly smaller. It's

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1 approximately half.

2 So still we're in a position here where the total

3 dollar amount in dispute is approximately $10,000, plus or

4 minus five, and it's just not economically sensible for us to

5 spend the money to do all the discovery which has not really

6 been done on the, on the contesting the, you know, whether it

7 should be paid, whether it shouldn't be paid, and the, and the

8 documents to back that up, the orders and so on and so forth to

9 get to that.

10 And you may or may not be aware that this case was

11 sort of moving slowly compared to other jurisdictions and then

12 all of the sudden it leapfrogged to the front and at a point in

13 time when discovery hadn't been completed. So that's one of

14 the reasons why there were requests for continuances in order

15 to make sure the discovery was in before we did the testimony,

16 amended the testimony and so on and so forth. So we've had a

17 limited amount of time. With the limited amount of time we

18 have to get ready and the limited dollars at issue for the

19 issues in Issue Number 2 or the promotions in Issue Number 2,

20 you know, we're not prepared and nor do we think it's

21 economically reasonable to litigate those at this point in

22 time, so we're dismissing them without prejudice.

23 We still have a dispute because we don't have an

24 agreement on, on whether the money is owing or not, but we are

25 not compelled to bring that to the Commission. And, of course,

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1 BellSouth has not made it a counterclaim, so they haven't

2 brought it in on their own.

3 My understanding of the background rule is that we

4 can withdraw anything without prejudice basically before it's

5 heard. If that is untrue and there's a rule that prevents us

6 from doing that, unless there's good cause, which I think I've

7 demonstrated as it is, then, you know, I'll stand corrected.

8 But nevertheless there's good cause to not hear it. If they

9 want to hear it, if they want to have that litigated for that

10 small amount, they are entitled to bring a case of their own,

11 or if they had done so earlier, they could have counterclaimed

12 in this case to preserve that as an issue to be discussed and

13 dealt with. But they can't hold us to it in this particular

14 case. And in any event, we would not be prepared to do so

15 because we haven't had a chance to complete the discovery on

16 those issues.

17 COMMISSIONER McMURRIAN: Thank you, Mr. Malish. This

18 is a good time for me to turn to our staff attorneys and get

19 their input on exactly what discretion the Commission has in

20 this sort of instance and particularly with respect to any

21 procedures that speak to with or without prejudice in this type

22 of situation.

23 MS. HELTON: Were you looking to me, Commissioner?

24 COMMISSIONER McMURRIAN: Anyone who wants to jump at

25 that one.

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1 MR. MALISH: Commissioner, I might be able to add

2 something. Basically what we would have as a practical matter

3 here in Florida is we would have a defense. This is not

4 something that we're willing to litigate. We don't want to

5 spend $20,000 to try to collect $10,000 from them; however, we

6 believe we have a defense should they come after us for the

7 $10,000.

8 I guess we would be willing to dismiss, to have the

9 thing dismissed without prejudice or with prejudice, excuse me,

10 as long as that doesn't affect our right to raise it as a

11 defense should they bring a case either before the Commission

12 or state or federal court. Do you see the problem we have?

13 COMMISSIONER McMURRIAN: I do see that as a different

14 twist and I wasn't understanding that from what you originally

15 said.

16 MR. MALISH: Right.

17 MS. HELTON: I think Mr. Carver wants to address

18 that, and I would really be interested in hearing what he has

19 to say there.

20 COMMISSIONER McMURRIAN: Go ahead, Mr. Carver.

21 MR. CARVER: I think that's sort of a distinction

22 without a difference. I think he's saying that they would

23 dismiss it with prejudice but they would still dispute it,

24 which means they still wouldn't pay it, which would --

25 COMMISSIONER McMURRIAN: I hate to interrupt you, but

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1 as I understood what he was saying, he was saying that if you

2 brought a claim against them, that they would dispute it. I

3 guess I see those two things as different about who's raising

4 the issue, but help me understand.

5 MR. CARVER: Well, I think actually the way the

6 process works, as I understand it in the interconnection

7 agreement, is that we bill them and they dispute it. And

8 what's happened with this is that they've taken their credit

9 requests and they have offset them against undisputed debt. So

10 region-wide there's approximately $1.7 million in services that

11 we have rendered to them that they have not paid us for because

12 they say that in the aggregate their credits offset that

13 amount, and some of this debt is four, five years old. In the

14 case there are facts that go back to 2003. So it's been out

15 there for a long time.

16 Typically the way the process works is that, is that

17 we bill them, they dispute the debt, there is a dispute

18 resolution process. And if it isn't worked out that way, then

19 we can begin collection procedures. And at that point -- and

20 one of the collection procedures is to, you know, stop their

21 access to ordering. And typically what happens, if someone

22 thinks that the way it works under the interconnection

23 agreement, if they believe the dispute is legitimate, then they

24 file a claim with the Commission, assuming it's an

25 interconnection agreement. Or if it's outside of the

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1 Commission's jurisdiction for some reason, it could be state

2 court. But the way the interconnection agreement is

3 structured, it's typically incumbent upon the CLEC to file the

4 action.

5 And the problem we have here is that's exactly what

6 they did two years ago, and we didn't counterclaim because it's

7 already before the Commission. There's no reason for us to

8 file something that duplicates their complaint because,

9 frankly, I mean, I've never seen a party try to do this before.

10 I mean, there's no reason to think that you have to keep

11 someone from withdrawing something at the eve of the hearing.

12 But we've been moving forward, we've conducted discovery, we've

13 filed testimony, we've put a lot of work into developing this

14 case. I mean, if you look at Ms. Tipton's testimony, there's

15 an analysis that reflects a lot of time to figure out what was

16 due and to determine whether the credit requests were

17 legitimate or whether they weren't. And we've checked and

18 double checked and determined that they weren't, and now it's

19 before the Commission and we just want a resolution.

20 At this point after two years the work has

21 essentially been done. All we need to do is go to hearing. If

22 at this point they've decided they want to drop the claim

23 because it's a small amount of money and it's not worth the

24 trouble -- and, by the way, I think it's, it's small, but I

25 think it's probably more like 20 to $25,000, but it's small

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1 either way. If they've decided it's not worth it to, to have

2 whatever additional increment of labor would be involved to

3 actually try this at the hearing, then that's their

4 prerogative. They can drop it. But in that case the

5 Commission should not allow them to do so without prejudice so

6 that we now have to go back and put that back in the pot with

7 the other $1.7 million and start all over again.

8 COMMISSIONER McMURRIAN: But I'm still maybe somewhat

9 confused about the differences that -- I guess I'm not

10 understanding the difference the same as you, Mr. Carver.

11 I thought what I heard Mr. Malish say was that he

12 would be able to dismiss it with prejudice if they weren't

13 prevented from, I guess from defending themselves if you

14 brought a claim later, if AT&T brought a claim later.

15 MR. CARVER: But my point -- I'm sorry.

16 COMMISSIONER McMURRIAN: But the -- okay. Go ahead.

17 Go ahead.

18 MR. CARVER: My point is typically I don't think it

19 works that way.

20 COMMISSIONER McMURRIAN: Okay.

21 MR. CARVER: Usually what happens is there's an

22 escalation process that if it can't be resolved, then at that

23 point we would begin collection procedures which would involve

24 denying them access to ordering systems and ultimately cutting

25 them off. And this has happened with dPi in other states, and

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1 what they do at that point is they come before the Commission

2 and then it's before the Commission on an emergency basis. And

3 we're not, you know, we're not trying to cut them off

4 prematurely, so we'll allow that to happen.

5 But I think as a practical matter what's going to

6 happen is if you allow them to dismiss this and to preserve

7 their claim that they don't have to pay the money, then we're

8 going to go through the process the interconnection agreement

9 allows us to go through and it's going to be back before the

10 Commission probably in another month or two.

11 COMMISSIONER McMURRIAN: Okay. I see what you're

12 saying. Mr. Malish, did you want to add anything to --

13 MR. MALISH: Well, I think it's a little bit

14 misleading to state that there's $1.7, $1.7 million in dispute

15 here. Really what we have here is approximately $850,000 in

16 dispute, and that's, that's sector-wide.

17 COMMISSIONER McMURRIAN: And we don't have to decide

18 any of that today.

19 MR. MALISH: Right. And what we're talking about is

20 late fees on top of late fees that they're attempting to

21 extract in addition to that.

22 I don't dispute that BellSouth or AT&T can bring a

23 claim. They can bring a claim in this case, they can bring a

24 claim outside of this case if they want to bring a claim to say

25 that we are owed this money, we should be paid. They have

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1 every right to do that, but they haven't. And we are not

2 prepared to defend a claim like that in this case right now.

3 If they want to amend to bring that claim, then we'll have to

4 have a little bit of extra time to get prepared. And, you

5 know, we can't be ready on October the 1st to talk about these

6 two claims.

7 COMMISSIONER McMURRIAN: Okay. I'll turn to staff

8 counsel now.

9 MS. HELTON: First, let me say I applaud any efforts

10 or any thought process that thinks about the cost of litigation

11 and the amount in dispute.

12 Given all of that, however, you know, when you file a

13 petition or a complaint with the Commission, the Commission

14 becomes vested with jurisdiction over that, and it's only with

15 the tribunal's permission can you amend that complaint. And

16 the way I see what dPi is doing here is attempting to amend its

17 complaint without your, your leave. I think you have

18 discretion to decide whether Issue 2 should stay in or not.

19 It's a different matter whether, if it, if you decide to remove

20 Issue 2, whether that should be without prejudice or with

21 prejudice. And, quite frankly, that's something that I had not

22 thought about before walking in here and I'd like an

23 opportunity to give a little bit of time to research that. To

24 dismiss something with prejudice is, should not be taken

25 lightly and I think there should be a very good reason before

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1 doing so. And I'm not sure -- I don't understand enough about

2 this case to know whether it's appropriate here.

3 COMMISSIONER McMURRIAN: So, Ms. Helton, it's one

4 thing for the parties to agree to dismiss an issue with

5 prejudice, but it's a different thing -- and I don't, and I

6 didn't mean to suggest, and it was probably inartful wording on

7 my part, I didn't mean to suggest that I felt like we were in a

8 posture to decide whether to dismiss it ourselves with or

9 without prejudice. I suppose I'm faced with a decision of

10 whether or not to include Issue 2, but we would need to address

11 with or without prejudice on that.

12 MS. HELTON: It sounds like the parties are in

13 agreement that Issue 2 should not be included. AT&T only

14 though, if it's not included so that, such that dPi can no

15 longer bring that issue back before the Commission. Based on

16 the exchange that I heard, I'm not sure that dPi agrees with

17 that. And correct me if I'm wrong, please.

18 MR. CARVER: Well, if I may address -- I'm sorry.

19 MR. MALISH: Well, I thought you were looking at me,

20 so.

21 MR. CARVER: Okay. Then let me, let me say this. I

22 want to clarify our position a little bit. Our position is

23 it's part of the case and we're ready to go. You know, we've

24 worked it up, we've filed testimony, we're ready to try it.

25 And the case has been before the Commission for two years. DPi

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1 has had the same opportunities we have. They could have sent

2 out discovery pretty much any time during that entire two-year

3 period, except for the brief portions when it was abated. They

4 could have filed testimony the same as we did. They could have

5 propounded discovery on it. So we feel that we're being

6 disadvantaged because we're ready to go, we want to try the

7 case, we want -- dPi wanted their day in court; we want to give

8 it to them. But now after two years basically they want to

9 take it out in a way such that the process would have to be

10 started all over again. So I'm not saying we agree to their

11 dismissing it regardless and it's just a question of, you know,

12 legally whether it's with or without prejudice. Our position

13 is we want to go forward with the case, we want to try the

14 issue. And if they're going to dismiss it, then they should

15 basically concede the issue and stipulate on that basis.

16 COMMISSIONER McMURRIAN: Mr. Malish.

17 MR. MALISH: I should point out that notwithstanding

18 the fact this was filed in November 2005, for the vast majority

19 of the two years that this case has been technically on file it

20 has been abated while it's been moving forward in other

21 jurisdictions. And so the, you know, the actual amount of time

22 spent working on the issues here in Florida has been very much

23 shorter than two years. So I think it's extremely disingenuous

24 to suggest that we're not ready because of a lack of diligence

25 on our part.

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1 In any event, we can dismiss this case, this part of

2 the case with prejudice, but that's different from what they're

3 asking for. What they're really asking for is summary judgment

4 or a summary decision in their favor on these issues. We can

5 dismiss with prejudice, which just simply means we cannot make

6 an affirmative claim for relief based on these issues; in other

7 words, we can't sue them for this money, and we're fine with

8 that. The problem that we have, of course, is if they choose

9 to sue us for whatever this relatively small dollar amount is,

10 we need to be able to say, huh-uh, you don't get that money,

11 you're not entitled to it, and if you want to the litigate it,

12 we're ready. But, again, we'd still have to do some discovery

13 to figure out, you know, to present a full and accurate case.

14 As you probably know, the, the testimony to which Mr.

15 Carver was referring, all of the original direct testimony in

16 this case was filed before we had any discovery responses at

17 all in any of the, to any of the questions or any of the issues

18 that are involved in this case overall. So if we're going to

19 litigate it, we need to have some time to see exactly where

20 we're going to focus our defense on those particular issues.

21 But like I said, we just don't feel like it's worth taxing

22 ourselves or the Commission on something as small as that.

23 We'd rather, we'd rather focus the attention on the big

24 picture, you know, the lion's share of the dollars in dispute

25 here, so.

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1 COMMISSIONER McMURRIAN: Well, like Ms. Helton, I

2 appreciate parties trying to make our job a little bit easier

3 and I guess consolidate and focus on the issues that we really

4 need to make decisions on. Having said that though, I noticed

5 that you said that you believe what we really have before us is

6 a motion for summary judgment. I disagree. I think that

7 that's not something that's before us. It's definitely not

8 something that I'm asked to do as prehearing officer.

9 But I believe that if either party wants to litigate

10 Issue 2 at this point, that it should remain. From what

11 Ms. Helton said, it seems like we have the petition filed

12 before us, and that petition included some of these issues and

13 that at this point that it seems fair to leave Issue 2 in and

14 let each party take whatever position on Issue 2 they want.

15 And that reminds me that in Issue 2 in the Prehearing Order I

16 noted that your position was "No response," and I recognize in

17 the OEP it states that essentially by the prehearing,

18 prehearing conference that parties should take a position on

19 issues. So what we can do is give you some time to amend that,

20 if you would like. If you would like to amend it here today or

21 if you would like some time to put forth a position on Issue 2

22 perhaps by the end of the day, we can do that.

23 MR. MALISH: As a matter of logistics, I think that's

24 going to be practically impossible to amend it before the end

25 of the day. We're basically committed to doing depositions as

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1 soon as we walk out of this room through the end of the

2 evening, at which point Mr. Bolinger and I will be going back

3 to Texas and, and Mr. Watson will be going, who's just a

4 witness anyway.

5 COMMISSIONER McMURRIAN: Well, we'll have a few days,

6 sorry to interrupt, but we'll have a few days probably before,

7 a day or two before we finish the Prehearing Order, so we could

8 give you more time. But when do you think you could have a

9 position on Issue 2? Or, I mean, if you want to leave it "No

10 response," that's absolutely your option, but I'm just pointing

11 out that it would probably behoove you --

12 MR. MALISH: I mean, I guess at this point our

13 response could be we deny everything that they say, and then I

14 have to come back and try to fill that in at the hearing.

15 It's, it's an ugly way of trying to fix it, but it may be

16 better than, than not fixing it at all.

17 I apologize for the, for the, for the difficulty.

18 But, you know, short of moving the, short of moving the hearing

19 and allowing us some time to conduct some additional discovery

20 on these things that we're trying to set aside because they're

21 not important, given, you know, the total dollar amount in

22 dispute, you know, I don't have a position that I could give

23 you right now or by the end of the day. And I don't know -- it

24 may be that, you know, on Monday and Tuesday when I can direct

25 my attention to this 100 percent I'll find out that I need to

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1 talk to so and so or get such and such documents before I can

2 have a meaningful response that will actually help the

3 Commission to decide the issue, which is really what we're,

4 really the purpose of discovery to begin with.

5 COMMISSIONER McMURRIAN: Mr. Malish, I mean, just

6 on -- off the top of my head, I think Monday or Tuesday is a

7 little bit late.

8 MR. MALISH: Well, the reason that I say Monday or

9 Tuesday is because Thursday morning at 9:00 I have a trial that

10 begins in Austin, Texas, that will go for two days, so I will

11 be completely unavailable, frankly, Wednesday morning when I'm

12 getting ready and Tuesday, excuse me, and Thursday and Friday

13 when I'm in trial, and that's why as a practical matter it just

14 won't be ready. I won't have the time, there are not enough

15 hours in the day for me to, to do what needs to be done. And,

16 and, you know, I apologize, but it is what it is. And I can't

17 make it -- I can't change it at this point, at this point in

18 the, you know, in life.

19 COMMISSIONER McMURRIAN: Do you have a recommendation

20 on how much time we should give? I'm not sure exactly when

21 we're shooting for the Prehearing Order to go out.

22 MS. HELTON: Let me let Ms. Tan speak to that. But I

23 can't help but say something here. The Order Establishing

24 Procedure in this case was issued on April the 13th of 2007.

25 And if I recall, I think there's a section in there that talks

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1 about that parties are expected to file positions on their

2 issues and their prehearing statements, which are then

3 incorporated into the Prehearing Order. And if you don't, then

4 the effect of that, of not taking a position is that you've

5 effectively waived your ability to raise or continue raising

6 that issue throughout the proceeding. And so I am sympathetic

7 in some ways to the counsel's problems with his time this week,

8 but, you know, the Order Establishing Procedure was issued in

9 the middle of April and we've had -- there's, you know, by my

10 count there's several months in there where he could have come

11 up with a position to his issue.

12 MR. MALISH: Well --

13 MS. HELTON: Excuse me. I'm not finished yet.

14 MR. MALISH: Oh, I'm sorry. Please, go ahead.

15 MS. HELTON: Staff is looking to bring to you the

16 Prehearing Order the beginning of next week. All that said, I

17 think that if they could provide you, have us an answer here

18 Monday morning first thing that we could incorporate into the

19 version that we bring to you for your signature, that seems to

20 me to be reasonable.

21 COMMISSIONER McMURRIAN: Mr. Malish, can you do that?

22 I mean, we'll set a deadline either way, but --

23 MR. MALISH: Right. I understand.

24 COMMISSIONER McMURRIAN: I think that that's probably

25 more time than I had in mind, quite frankly.

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1 MR. MALISH: Yeah. First thing in the morning for

2 y'all is going to be earlier than, or earlier for us than it is

3 for you because we're an hour behind. If you could make it

4 noon on Monday, that would be easier for us to actually get you

5 something.

6 MS. HELTON: Commissioner --

7 MR. MALISH: And I would, I would like to point out

8 that -- I understand that there is an order and I understand

9 that there was a procedural order, but that -- there are

10 basically just problems inherent in the system the way that it

11 is set up because we cannot narrow our issues until we've gone

12 through the discovery process to find out, okay, is Issue

13 Number 1 going to be 90 percent of what's at stake or is it

14 only going to be 30 percent of what's at stake? And until we

15 find that out through the discovery process, we cannot

16 concentrate our resources on what it makes the most sense to

17 concentrate our resources on.

18 Now, you know, that's just the way it is because of

19 the way that y'all do business down here in Florida, and I

20 understand that. And so if, if we had been able to know

21 beforehand that, that, you know, this was a smaller amount than

22 it actually ended up, than we were afraid that it might be, we

23 could have done things differently. But it is what it is at

24 this point. And if, if Monday at noon your time is fine, then

25 we will try to have something back to y'all by Monday at noon

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1 or 11:00 our time.

2 COMMISSIONER McMURRIAN: Frankly, Mr. Malish, and

3 probably this is a good time to say this, I've been somewhat

4 disturbed by some of the conduct in this case, and it's not

5 about one party or the other. I would appreciate, to the

6 extent we can going forward, and we're very late in the

7 schedule of things at this point, that we all work together to

8 get the info we need before the Commissioners so that we can

9 make decisions on Issues 1 and 2. And I note what you've said

10 about this; although it's a 2005 docket, it was in a period of

11 abeyance for a long time.

12 That said, I think we've afforded a normal schedule

13 in this case, like we do in a lot of our cases. And perhaps

14 it's different in other states and maybe we have a smaller

15 amount of time to get things done in. I don't know. But that

16 said, it seems to work in most of our cases that we're able to

17 get the discovery done and get positions and, frankly, don't

18 usually spend this much time in a prehearing conference on just

19 trying to get positions in the Prehearing Order, quite frankly.

20 So if you need any procedural assistance or need advice on how

21 we do things in Florida, I suggest that maybe you avail

22 yourself of the General Counsel. They're really good in other

23 procedures and can help you out. And I'd venture a guess

24 that's there's already been a lot of discussion between the

25 parties in this case with Ms. Tan several times, and I think

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1 you have found her to be helpful, and I suggest that we

2 continue to do that.

3 That said, I think that noon on Monday is pushing it.

4 I was frankly thinking more like Thursday of this week. But I

5 think Monday 8:00 a.m. seems reasonable because we do want to

6 get the Prehearing Order out in time. And I would suggest too

7 that in order to focus your attention on the hearing which is

8 early next week, that perhaps we need to get the position

9 statement out of the way and focus on cross. Or not early next

10 week, early the next week. But that we need to have a

11 Prehearing Order for the parties to sort of, to follow to get

12 ready for conducting the case that week, and I think Monday

13 morning should be sufficient to develop a position on Issue 2.

14 MR. MALISH: Commissioner, if you will allow

15 Mr. Bolinger to file on his own instead of through me, because

16 he's not really admitted pro hoc vice in this case, he can do

17 it by Thursday. I don't know.

18 MS. HELTON: I don't think we're that formal as to

19 where we require filing. I think a simple e-mail to Ms. Tan

20 would work beautifully.

21 COMMISSIONER McMURRIAN: That's sufficient for me.

22 Does that work for you?

23 MR. MALISH: Okay.

24 COMMISSIONER McMURRIAN: Thank you.

25 So where are we? I guess that leads us to

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1 Section IX, the exhibit list? Is that correct?

2 MS. TAN: That is correct, IX.

3 COMMISSIONER McMURRIAN: Thank you, Ms. Tan. Which

4 is on Page 7. Are there any changes to this section? Go

5 ahead, Ms. Tan. I think you wanted to point out something

6 about the exhibit list.

7 MS. TAN: There are no changes, but staff would like

8 to note for the record that we will prepare a comprehensive

9 exhibit list consisting of all prefiled exhibits for the

10 purposes of numbering and identifying the exhibits at hearing.

11 Staff will provide the exhibit list to parties as soon as

12 possible.

13 Staff also intends to prepare a proposed stipulated

14 exhibit composed of certain discovery responses and deposition

15 transcripts, which it will provide to the parties in advance of

16 the hearing.

17 COMMISSIONER McMURRIAN: Are there any questions or

18 concerns about that?

19 MR. MALISH: None from dPi.

20 COMMISSIONER McMURRIAN: Okay. Ms. Tan, you might

21 have said, but approximately when might the parties receive

22 that just in case they need that information?

23 MS. TAN: We most likely will be sending it by the

24 end of the day. If not, no later than tomorrow.

25 MR. CARVER: Could I ask a question? And will that

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1 include depositions, did you say, also? I may have

2 misunderstood you.

3 COMMISSIONER McMURRIAN: I think it might.

4 MS. TAN: Staff typically likes to put the deposition

5 transcripts -- obviously, given what's been occurring, we may

6 not put that in at this time. When I circulate the proposed

7 list, you can let me know at that time whether or not we'll

8 have an issue with it and, if necessary, we can take it out and

9 deal with it at the hearing.

10 COMMISSIONER McMURRIAN: So, Ms. Tan, when you

11 circulate, will you include some kind of deadline in the e-mail

12 for the parties to get back to you if they have any objections

13 to any of the included exhibits?

14 MS. TAN: Certainly.

15 COMMISSIONER McMURRIAN: Is everyone on the same

16 page?

17 MR. CARVER: Yes. Thank you.

18 COMMISSIONER McMURRIAN: Section X, proposed

19 stipulations. I suppose we have none.

20 Section XI, pending motions. We have several.

21 Ms. Tan, did you want to --

22 MS. TAN: Would you like me to go ahead and list them

23 all?

24 COMMISSIONER McMURRIAN: -- go through them one by

25 one maybe?

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1 MS. TAN: Okay.

2 COMMISSIONER McMURRIAN: And I'll add in as

3 necessary.

4 MS. TAN: The first one that we received was dPi

5 filed a motion for leave to file amended testimony on

6 July 23rd, 2007.

7 COMMISSIONER McMURRIAN: There were no objections

8 filed to this motion; correct?

9 MS. TAN: None at all.

10 COMMISSIONER McMURRIAN: I'll show the motion

11 granted.

12 MR. CARVER: I'm sorry. I did have a concern I would

13 like to raise about their amended testimony.

14 MS. TAN: This is for July 23rd, which is just for

15 the numbering.

16 MR. CARVER: I'm sorry. I'm sorry. I got confused.

17 I apologize.

18 COMMISSIONER McMURRIAN: I'll show that motion

19 granted. We'll get to the other one, Mr. Carver.

20 MR. CARVER: Thank you.

21 MS. TAN: There was also -- AT&T filed a motion to

22 strike, which an e-mail ruling, I mean, an order is pending,

23 but I just wanted to note that an order is pending on that.

24 On -- hold on one second. And there was a response

25 in opposition filed by AT&T to -- sorry. DPi filed a motion to

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1 compel for provision of information requested in dPi's request

2 for information 1 through 19 on September 13th, and AT&T filed

3 a response in opposition to dPi's motion to compel, which was

4 filed on December 17th.

5 COMMISSIONER McMURRIAN: September 17th.

6 MS. TAN: Yes.

7 COMMISSIONER McMURRIAN: Okay. Let me first ask both

8 parties whether you all have been able to work something out to

9 get the information needed.

10 MR. MALISH: I hope I'm not speaking out of class,

11 but I think where we left things right before lunch, Mr. Carver

12 and I, is that he would withdraw his objections to our amended

13 or late-filed testimony if he were given an opportunity to

14 amend his, I guess, rebuttal testimony. It doesn't matter to

15 us which testimony he amends. If he's allowed to do that by --

16 did you say Thursday? And I don't know if you meant Thursday

17 of this week or next week.

18 MR. CARVER: Maybe I'm confused again. I thought we

19 were talking about a motion to compel.

20 COMMISSIONER McMURRIAN: We are.

21 MR. CARVER: Okay.

22 COMMISSIONER McMURRIAN: And I'm sorry for the

23 confusion.

24 MR. CARVER: I'm sorry.

25 COMMISSIONER McMURRIAN: I think we're talking about

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1 your motion to compel now, and AT&T filed a response to that

2 earlier this week, perhaps yesterday.

3 MR. MALISH: We're still at an impasse about that.

4 The only thing that we've been able to agree to is the thing

5 that I mentioned earlier about the testimony.

6 COMMISSIONER McMURRIAN: Okay.

7 MR. MALISH: So that's the only agreement, if that is

8 an agreement.

9 MR. CARVER: Well --

10 COMMISSIONER McMURRIAN: We'll take that up in a

11 second, but I'm glad to hear it.

12 But with respect to the motion to compel, is that

13 your understanding too, that you all haven't been able to work

14 anything out on the information that dPi seeks?

15 MR. CARVER: That's correct. We discussed it a

16 couple of hours ago and tried, but we have not been able to

17 work that out.

18 COMMISSIONER McMURRIAN: Do you think that you're

19 going to be able to work something out so that if I give you

20 perhaps to the end of the day, maybe at the end of the

21 depositions if you all -- to try it again or -- I'm seeing nos.

22 Mr. Carver?

23 MR. CARVER: I don't think so. I mean, frankly,

24 we're at a point where what, and I don't mean to preargue here,

25 but what dPi has asked for is something that's impossible to do

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1 before the hearing, and we've tried to tell them what we can

2 do. I mean, we have objections to it. We don't think it's

3 relevant. But we've tried to do as much as we can and they've

4 told us that's not acceptable. So I don't --

5 COMMISSIONER McMURRIAN: So let's do it this way

6 then, and I hate to interrupt again. Mr. Malish, if you'll

7 summarize your motion to compel, then I'll allow AT&T an

8 opportunity to summarize their response, and about five minutes

9 each I think should be sufficient. And then we'll get a

10 recommendation from staff, and then I'll decide whether or not

11 to take it under advisement and look at it more closely and

12 then rule later, perhaps by the Prehearing Order, or whether

13 I'll rule on it today, but probably the former.

14 So, Mr. Malish, if you'd like to take five minutes

15 and argue the motion to compel.

16 MR. MALISH: Thank you, Your Honor. I'm sorry. I

17 guess it's Commissioner, not Your Honor. I don't know. Maybe

18 it's Your Honor. I always get tripped up by that, so I

19 apologize.

20 COMMISSIONER McMURRIAN: Commissioner is fine.

21 MR. MALISH: The outstanding discovery dispute that

22 we have hones in on what turned out to be the cornerstone or

23 the linchpin of BellSouth's case or at least the decision of

24 the North Carolina Commission in the North Carolina

25 proceedings. And the, the contention there and in Florida as

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1 well by BellSouth is that we do not have to make this line

2 connection charge waiver available to dPi's end users because

3 we don't make it available to our own. And that is a

4 conclusory statement and it is made -- it was made entirely

5 based on the hearsay testimony of Pam Tipton in North Carolina

6 but, nevertheless, became the cornerstone of the, excuse me,

7 the decision there. And it's necessary for us to be able to

8 test that to see if that's actually true.

9 So, first of all, we need to be able to see do they

10 have end users that subscribe to service in this particular

11 way, and, if so, what do they actually charge them? Because

12 that is what drives -- that would -- you know, if, number one,

13 they haven't had anybody sign up for it the way that we sign up

14 for it, then they've just made something up. Number two, if

15 they have signed people up for it and they gave them the line

16 connection charge, then we are definitely entitled to it. That

17 would be like basically the smoking gun for us, frankly. And

18 we've asked to see this information from a specific period of

19 time. We'd like to see it in calendar year 2004 and calendar

20 year 2003. Those are the most important times for us.

21 And the reason why those are the most important times

22 is because when this was first -- before this actually became a

23 dispute and these promotion credits were being applied for,

24 they were actually being paid. They were being paid to other

25 CLECs. And at a certain point in time BellSouth basically

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1 changed its position and stopped paying them and has now said,

2 well, if we paid them before, it's because we were cheated or

3 fleeced or defrauded or whatever. And they would like to, if

4 they can, show us what they've been charging their customers

5 for these sorts of services or these combinations of services

6 lately. But the thing that would be most helpful for us and

7 for the Commission to see is what the pattern and practice was

8 before this became a contested issue, and that's when we want

9 to see this evidence. And it exists, but they have a hard time

10 getting it.

11 Now we've asked for it in, in all of the BellSouth

12 states basically going back to whenever we've filed discovery

13 in any one of these cases that we have and they're in every one

14 of the jurisdictions, and we've never seen a single order, not

15 one that shows the actual order and what was charged for that.

16 Basically what they're hanging their, their case on

17 is the testimony of one person who's under any circumstance, I

18 guess, besides, you know, except in certain -- in any court of

19 law that testimony which they're using as the cornerstone of

20 their case is not admissible because it's hearsay. And so we

21 have to -- this is the only way we have to challenge it, this

22 is the only way we have to look at it. And if they're going to

23 say that we are, we get a free pass on this because we don't do

24 it that way, they ought to be able to show it to us. The

25 documentation or the electronic data exists, they just have to

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1 go and collect it and show it to us.

2 If they can't get it ready, I don't have, I don't

3 have -- that's not my fault and it's not my problem. If there

4 is a need to postpone or something like that so they can find

5 it, I can understand that. But to say that we just can't, we

6 shouldn't have to provide it and we should be allowed to

7 testify about it anyway when we go to hearing, that's something

8 that can't possibly be acceptable under any traditional notions

9 of fair play and justice. So it's a piece of critical

10 discovery that we're asking for because it goes to the heart of

11 the case, and to allow them to just make the contention without

12 having that investigated is totally improper.

13 COMMISSIONER McMURRIAN: Thank you, Mr. Malish. And

14 just one clarification point. You mentioned the calendar years

15 2003 and 2004. From memory, and I need to look back at it, but

16 did your request also include as far back as 2002 and you're

17 not --

18 MR. MALISH: It did. If we're trying to make it

19 easier for them to find it, I can, I can limit it to 2004 and

20 2003. The farther back in time we go apparently the harder it

21 is for them to find something.

22 We applied, dPi applied for the promotion in August

23 of 2004 to cover -- well, it initially applied for it in August

24 of 2004, but based on service that had been rendered throughout

25 2004 and into, back into 2003. So that's why those are the

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1 relevant time frames. And also it should be noted that in

2 January, February, March, April of 2004, that's when BellSouth

3 was paying this promotion to other entities, at least ones that

4 we know about. And they may have been paying it to other

5 entities that we don't know about or at different points in

6 time, but, you know, this is where we know there has to be

7 some, a period which there has to be some information out

8 there, and it's the most useful to us. Because after they

9 changed their policy on whether they're going to pay these or

10 not, you know, and then they provide orders after they've, you

11 know, they've done an analysis and said that we're just not

12 going to pay these anymore, that doesn't help. We need to see

13 what was going on before they took a position, before there was

14 a dispute.

15 COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

16 Mr. Carver.

17 MR. CARVER: Thank you. We believe that dPi's motion

18 should be denied for three reasons: One, the information

19 they've requested is irrelevant; two, responding would be

20 tremendously burdensome; and, three, dPi has made this request

21 so late that it would be impossible to respond to it. I mean,

22 it's simply not possible before hearing. And I'll get to that

23 a bit later in my presentation, but I will explain that.

24 The irrelevance issue, I know typically discovery is

25 a very broad net, so I'm only going to touch on that very

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1 briefly and move on, but I do think it's an important note.

2 What they're asking for is what we do with our customers when a

3 customer orders a block. In other words, when the customer

4 orders a block, does it qualify them for the line connection

5 waiver charge? Our belief, and we're trying to develop this

6 through the depositions we're taking today, is that dPi

7 customers did not order any blocks. Instead, what happens is

8 when a dPi customer signs up, dPi places blocks on their

9 customers' lines. They place them there without the customer's

10 knowledge, without the customer's consent. They don't charge

11 the customer for it, but then they use that as the basis to try

12 to generate the promotional discounts. And then if they get

13 the promotional discount, they keep the money. They don't pass

14 it on to the customer. We believe that that is a fundamentally

15 different situation than the situation we have with our end

16 users because we don't put things on our end users' lines that

17 they don't order. So to go and say they want to see what our

18 end users have ordered, it's not exactly relevant.

19 Now I will admit that there are some other theories

20 in the case and under those theories is might be relevant. So

21 what we did is rather than -- I think it's important to make

22 the point that it's not really relevant, but I'm not standing

23 on that alone. We did go and we have tried to respond to this

24 as best we can, but here's the problem. The request that dPi

25 has made, and they say that they've made this -- that we

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1 haven't produced any orders.

2 Well, the reality is is that what's happened in every

3 state they request us to give them every order of every one of

4 our customers who've ordered blocks for a five-year period. In

5 the State of Florida we have millions of residential customers.

6 To look through millions of orders for a five-year period is

7 something that is simply insurmountable, so we objected. We

8 objected five weeks ago. DPi waited three weeks before they

9 came to us and suggested that they would take anything less

10 than that. There was a period of about three or four days of

11 negotiation, and we reached the point where we said, okay,

12 we'll try to look and we'll try to see if we can find this, if

13 it's even possible.

14 And we have programmers and IT professionals who have

15 been working, it's my understanding, virtually around the clock

16 to find out if there's any way to do this, if there's any way

17 to look through millions and millions of orders to determine

18 which of those customers ordered blocking, ordered two blocks

19 and ordered nothing else, and it is a monumental task. It's

20 virtually impossible to do this because they have to come up

21 with a program to go into the system, and it takes time just to

22 develop the program, much less to run the program and to get

23 the responses.

24 And what we found as a result of this and what we've

25 offered to dPi is that we can give them a spreadsheet that

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1 would show them what our residential customers -- well, first

2 of all, it would identify the residential customers who've

3 ordered two or more blocks and it would tell them whether or

4 not they received the promotional credit for the time period

5 from September 2005 through August 2007. I mean, our people at

6 this point will literally have to work night and day, but I

7 think they can come up with that two years.

8 The difficulty is that we would pull this from a

9 particular billing system which only keeps the records for two

10 years. After it drops off the system, in order for the

11 information to be extracted, our programmers have to go into

12 another database. And, frankly, what's happened is because dPi

13 has delayed this request for such a long time, we're working to

14 try to see what we can do, but even the information of how it

15 would be done and the information about how it could be done is

16 something that we're sort of struggling to get our hands on.

17 But it appears that once the information drops off the primary

18 database, they would then have to go into backup databases and

19 extract the information from customers manually one account at

20 a time for millions and millions of customers. It simply can't

21 be done.

22 So we have ordered them -- we have offered them the

23 two years. We have offered them this even though they waited

24 until ten days ago to even move off of their request that we

25 look through ten million records. And when I say ten million,

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1 I'm looking at the customer base multiplied by five years.

2 Even though they did that, we've been working. But this is,

3 this is the best we can do in the short time frame.

4 Now one other thing I want to add, counsel for dPi

5 says that he needs two years before, and he really doesn't.

6 Because this notion that BellSouth somehow in bad faith simply

7 decided that they weren't going to pay orders, there is

8 absolutely no evidence in this case whatsoever to suggest that.

9 Mr. Bolinger says that in his testimony, but they have provided

10 absolutely nothing. But based on that and with nothing more

11 they want us to basically plow through, again, you know,

12 millions of customer records. It's tremendously burdensome.

13 And we've tried our best, even though I don't think we should

14 have to do this, but we've tried our best and two years is all

15 we can do in the time that we have. And under the

16 circumstances, under the fact that they waited until very

17 recently to propound the discovery, based on the fact that they

18 waited three weeks after we objected before they even tried to

19 start the process, I think this is going above and beyond.

20 But, again, it's the best we can do.

21 COMMISSIONER McMURRIAN: And one clarification for

22 you too, Mr. Carver. Is it -- and I understand what you said

23 about going to another backup database, but is it harder to get

24 the information for 2003 and 2004 than it is to get it for 2005

25 through 2007?

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1 MR. CARVER: It's virtually impossible because here's

2 what happens. There's a database that's used -- and, again,

3 the problem I'm having here is that dPi requested this so

4 recently that our people have just started looking into it.

5 And what I'm telling you is my best belief about the way the

6 process works, but this has literally all come up within the

7 last few days. So, you know, I hope that I can say this with a

8 qualification that it's my understanding.

9 The last two years, that's a database that is used by

10 customer service representatives and other people in customer

11 services and I think they could run a program to extract the

12 information from that. But what happens is it ages out.

13 Because, I mean, when you have customer service records for

14 millions of customers, it's an obvious drain on the memory of

15 the system. So it ages out and it drops off that system. Then

16 to the extent that there's any need to go back and look at the

17 customer records, there's a process, and I'll have to admit I

18 can't explain it completely. But as I understand it, the

19 programmers then have to go into a backup system and try to in

20 effect manually recreate the database that exists for the two

21 most recent years. And we've had to do this in response to

22 another request by dPi on, I believe it was Number 18. They

23 wanted to know how customers that they've sent to us were

24 handled on a, you know, on an account-by-account basis, and

25 this came up in South Carolina, it came up in Louisiana. And

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1 it takes something like, you know, six weeks to pull six months

2 of data even on their limited customer base. In terms of how

3 long it would take to pull this information for our customers

4 for years where it's already dropped off the system, I think

5 it's virtually impossible. Now I know with time and money

6 anything can be done, but I, I don't think that there's any way

7 it could be done prior to the hearing.

8 And, again, the only reason it's relevant is because

9 of this theory that dPi has that there is absolutely no support

10 for, and I would submit that that really shouldn't be used as

11 the basis for, to use the cliche, a fishing expedition that

12 would cause us to have to do something that would take

13 hundreds, perhaps thousands of hours, and maybe couldn't be

14 done at all.

15 COMMISSIONER McMURRIAN: Staff, are you prepared to

16 give a recommendation at this time or would you like to take it

17 under advisement as well?

18 MS. TAN: Staff's recommendation is that you take it

19 under advisement.

20 MR. MALISH: Do I have an opportunity to rebut any of

21 his -- I mean, it's my motion. I would imagine I have a burden

22 of proof here.

23 MS. TAN: It's not the Commission's practice to

24 accept responses to responses.

25 COMMISSIONER McMURRIAN: That was, that was my

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1 initial reaction as well, Mr. Malish.

2 Ms. Tan, we'll move on to the next pending motion.

3 MS. TAN: The next motion is that on September 14th

4 dPi filed a motion for leave to file amended testimony.

5 COMMISSIONER McMURRIAN: Okay. And I believe,

6 Mr. Malish, you had some information for me on this motion.

7 MR. MALISH: There are actually probably a series of

8 motions all connected with testimony probably from both sides.

9 And I may have misstated. My understanding of what I thought

10 was an agreed solution to this issue would be to let -- it was

11 brought up by Mr. Carver and he said, you know, if I can amend

12 mine on Thursday, and I don't know if he meant this Thursday or

13 next Thursday, then I don't have a problem with yours. And we

14 don't have a problem whether it's this Thursday or next

15 Thursday. And if that -- I'll have to let Mr. Carver affirm or

16 deny that that is the agreement. But if that is the

17 aagreement, we're happy to make that agreement, and that way

18 the, the Commission is, you know, has the benefit of as many of

19 the facts as we can get out on paper before the, before the,

20 before the hearing and we don't spend time fighting over what

21 facts are going to be allowed in and which aren't. We'll just

22 be as broad as we can be.

23 COMMISSIONER McMURRIAN: So if they're given the

24 opportunity to amend their -- well, perhaps I should just let

25 Mr. Carver explain, because I do need to understand whether

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1 it's direct and rebuttal or just rebuttal.

2 MR. CARVER: There's a little more to it than that,

3 and let me try to explain.

4 First of all, one objection that I had to their

5 motion is that they don't identify the changes. So basically

6 I'm put in the position of having to take the amended testimony

7 that they've filed and compare it to the previous one and try

8 to find all the changes. And what I asked Mr. Malish to do

9 earlier today is just to red line a copy and show me what they

10 changed so that I can be clear that I'm not missing something,

11 and I haven't received that. If I can get that and take a look

12 at it, you know, if I can get it by the end of the day, I think

13 I can agree to the rebuttal testimony. I don't have a problem

14 with their amending their rebuttal testimony because it's what

15 they said they were going to amend in their prior testimony. I

16 filed a motion to strike, it was denied, so that's settled, and

17 I don't have a problem with that. Again, if I can see a red

18 line to find out what they've changed to make sure there's

19 nothing objectionable that I've missed.

20 The thing I have a problem with is they've also

21 amended their direct testimony. And in the communications that

22 I saw about this issue, I thought it was contemplated that they

23 would only amend their rebuttal. What they've done is they've

24 gone back and they've amended their direct and they've amended

25 it on an issue that has nothing to do with what they, what they

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1 brought up in their rebuttal testimony originally. Excuse me.

2 Sorry.

3 In the original rebuttal testimony they just said

4 that they didn't know the amount in controversy and they wanted

5 to amend and they did, and that's fine. What they've done now

6 is they've come back in their direct testimony and they've

7 attached as an exhibit to Mr. Bolinger's testimony something

8 like, you know, 30 or 40 pages of e-mails that I haven't seen

9 before and it's in the direct testimony. If they file direct

10 testimony now, then we're deprived of the opportunity to

11 respond. So technically I don't think they should be allowed

12 to do it. But what I said in an effort to be cooperative is

13 I'll agree to it if I can have a chance to look at it and to

14 file some sort of rebuttal testimony. And, you know, there's

15 an exhibit. It, you know, it's going to take a while. So what

16 I was suggesting was that they agree to next Thursday, which

17 would be about two or three days before the hearing begins. I

18 mean, if we can have that amount of time to review what they

19 did and file rebuttal, that's fine. If not, I would object to

20 their amending their direct testimony.

21 COMMISSIONER McMURRIAN: So would, Mr. Carver, would

22 your rebuttal testimony be limited to rebutting the new

23 information that's added in the exhibits of the direct

24 testimony of dPi?

25 MR. CARVER: Yes, it would be. And there may not

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1 even be any. I mean, after review we might look at it and

2 decide there's no need to file testimony. But to the extent we

3 did, it would be limited to whatever they changed in the

4 direct. But, again, I would like for them to tell us what they

5 changed.

6 MR. MALISH: It sounds like I accurately summarized

7 the agreement, which is that he'll have next Thursday to amend,

8 and we're fine with that. And I'll get him a copy insofar as I

9 can of a, of a comparison red line. I asked my staff to try to

10 do whatever, you know, track changes kind of -- whatever the

11 word processing thing is that shows the old compared to the

12 new, and I should be able to e-mail that to him so it's

13 actually in red as opposed to a fax where it's all black. So,

14 so basically it's up to you. If you will agree to our

15 agreement, then it can be done.

16 COMMISSIONER McMURRIAN: It sounds like we have an

17 agreement. But as far as the timing, do you have any thoughts

18 on -- and is it next Thursday we're talking about any rebuttal

19 testimony would be due from, any revised rebuttal would be due

20 from you?

21 MR. MALISH: Yes.

22 COMMISSIONER McMURRIAN: Or would it be supplemental

23 rebuttal?

24 MR. CARVER: My guess, supplemental or amended

25 rebuttal. But I think, yes, nine days is what we're asking

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1 for.

2 MR. MALISH: I would prefer to call it amended

3 rebuttal so we can throw the old one out and just have the new

4 one.

5 MR. CARVER: Well, except we may not, we may not --

6 we're not going to refile our entire rebuttal testimony. I

7 mean, what I'm really proposing is we just look at what they

8 filed. And if it merits a response, then we'll just have

9 something that's maybe as little as a page or two and then

10 we'll go ahead and that will be a supplement. I think it's

11 better to do it that way than to have us try to, you know, redo

12 our testimony and work it in somewhere.

13 MR. MALISH: Well, that's fine then. That's fine.

14 MS. TAN: Commissioner, you have the discretion to

15 set the date for that. However, we would recommend that next

16 Thursday would be too long and that probably it would need to

17 be on Tuesday the 25th, no later than the 26th.

18 COMMISSIONER McMURRIAN: And if there were revised

19 rebuttal testimony somehow, would there possibly be a need to

20 do any discovery on it and would we have time to get that in?

21 MS. TAN: We would not have time to do that.

22 COMMISSIONER McMURRIAN: But if that's part of your

23 agreement and that's the understanding, then that's, of course,

24 fine with me. But if -- I'm just trying to foresee any

25 problems coming up if we do have any revisions filed. And,

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1 Mr. Malish, I look to you because it would be --

2 MR. MALISH: Yeah. To be honest with you, what's in

3 the amended -- when we filed the original testimony there was

4 things like, we don't really know what the situation is in

5 Florida, but if it's anything like it was in North Carolina,

6 then blah, blah, blah, blah, blah. And so we fixed it to say

7 now we know what it really is in Florida and here is what it

8 is.

9 The, the, the e-mail exhibits that Mr. Carver was

10 referring to are taken from the North Carolina case because

11 it's some correspondence that was going back and forth between

12 the parties. And Mr. Carver's predecessor in interest, Andrew

13 Shore, would have been -- you know, he's seen it and been

14 through it all and it was exhibits in the other case. And the

15 only reason that Mr. Carver may not be already familiar with it

16 is just because he had to take on this job from somebody else

17 who was lead counsel managing -- I believe Mr. Carver manages

18 the litigation in all the, in all the states like Mr. Shore did

19 before. So he may, Mr. Carver may not have seen it, but it's

20 something that's been in the case. When I say the case, I'm

21 talking about sector-wide. I can't imagine there being a need

22 for any more discovery.

23 COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

24 Mr. Carver, on the date.

25 MR. CARVER: I'd just request that Mr. Malish get his

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1 red line to me electronically within 24 hours. I've confirmed

2 with my witness if he can do that, then we can file by next

3 Tuesday.

4 COMMISSIONER McMURRIAN: Mr. Malish, and I'm not sure

5 if it has to be, you know, type and strike or if it could just

6 be a copy that highlighted where the changes were.

7 MR. MALISH: Yeah, one way or the other. But I, you

8 know, I'd just like -- you know, the Word Perfect or Microsoft

9 Word program does it for you, you know.

10 COMMISSIONER McMURRIAN: Right.

11 MR. MALISH: Yeah.

12 COMMISSIONER McMURRIAN: Could you do that within 24

13 hours?

14 MR. MALISH: That's what I'm trying to do. My staff

15 is supposedly doing that already, but I haven't seen the final

16 work product yet.

17 COMMISSIONER McMURRIAN: Ms. Tan, any concerns?

18 MS. TAN: That would be fine with staff.

19 COMMISSIONER McMURRIAN: And Tuesday, Mr. Carver, you

20 can do that by Tuesday?

21 MR. CARVER: Yes, ma'am, we can.

22 COMMISSIONER McMURRIAN: Okay. So, Ms. Tan, do we,

23 do we give that some time and just make sure that all those

24 things are taken care of or can we render some of these --

25 render the motion for leave to file amended testimony moot or

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1 do we just --

2 MS. TAN: I think that we can render it moot

3 considering that they have an agreement. I would like to ask

4 that if you are able to send a copy of the red line, if you're

5 doing it electronically, if you can give staff a copy also so

6 that we're aware of all the changes that were made in the

7 rebuttal that -- all the testimony that was submitted.

8 MR. MALISH: We would be happy to do so.

9 MS. TAN: Thank you.

10 COMMISSIONER McMURRIAN: Okay. I think that leads us

11 to AT&T's motion to compel that was filed yesterday.

12 MS. TAN: Right. And there were two filings that

13 were done yesterday: One was a motion to compel and one was

14 the motion to strike testimony of Pam Tipton by dPi. And what

15 we would recommend is that it's in your discretion to request

16 an expedited response time. And given that we are verging very

17 close to the hearing date, we would like, we would recommend

18 that you would do an expedited response time so that we're

19 adequately able to move on these issues.

20 COMMISSIONER McMURRIAN: Are you recommending a

21 certain deadline?

22 MS. TAN: Thursday would be good. No later than

23 Thursday.

24 MR. CARVER: On the response to the motion to strike,

25 I'd like to have an extra day, if I could. This is a

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1 significant motion. Basically dPi is moving to strike every

2 bit of testimony that we filed in the case. I'm going to be

3 here on depositions through the remainder of the day and

4 perhaps into the evening. I'll be driving back to Atlanta

5 tomorrow, so I can't really start working on it until Thursday.

6 And given the fact that it is a motion to strike all of our

7 testimony, I'd like to have a little bit of time to do some

8 research so that I can file something that's an adequate

9 response. And I don't think that there's any pressing need to

10 get it resolved immediately.

11 A lot of these discovery disputes are the sort of

12 thing where, where your ruling would then prompt some other

13 step and someone would have to respond or answer something.

14 But the motion to strike, I think as long as it's sorted out,

15 you know, by the time Ms. Tipton would take the stand on

16 October 1st I think is adequate. So in this circumstance, I

17 understand why staff wants expedited treatment, but I would

18 really like to have as much time as you can possibly give me

19 because, again, I think it's a very significant motion and it

20 deserves a substantive response.

21 MS. TAN: I think that staff could probably do

22 Monday. But if you could get it in by noon on Monday, that

23 would be appreciated.

24 MR. CARVER: This next Monday?

25 MS. TAN: Yes.

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1 MR. CARVER: Okay. That would be fine.

2 COMMISSIONER McMURRIAN: Well, you were asking for

3 Friday.

4 MR. CARVER: I was asking for Friday, but Monday

5 would be wonderful.

6 COMMISSIONER McMURRIAN: Ms. Tan --

7 MS. TAN: Oh, I missed --

8 MR. CARVER: If I could have the weekend, even

9 better. I thought my argument was that compelling.

10 (Laughter.)

11 COMMISSIONER McMURRIAN: I want to give both of you

12 the same amount of time and realize that dPi's response on the

13 motion to compel might be fairly lengthy as well because I see

14 that it is in response to several interrogatories and requests

15 for admission. So, Mr. Malish, I want to ask you, how much

16 time do you think you need? Could you get something by Friday

17 or --

18 MR. MALISH: This Friday?

19 COMMISSIONER McMURRIAN: Would you like Monday as

20 well?

21 MR. MALISH: Well, I would have to have Monday. But,

22 you know, I might be prepared to do this orally. If you can do

23 it orally without a written submission from us, I could do it

24 orally now. That's --

25 COMMISSIONER McMURRIAN: We could, we could take oral

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1 argument on it and then I could take it under advisement.

2 Because I just, I haven't had the opportunity yet to look at

3 the motion to compel, so I wouldn't be able to give you a

4 ruling now. But if you would like to give your oral

5 response -- Mr. Carver, are you prepared to give a brief

6 summary of your motion to compel now?

7 MR. CARVER: I hadn't planned to do that today, but I

8 can, I can brief in the motion and do my best.

9 COMMISSIONER McMURRIAN: I mean, Mr. Malish, if

10 you're okay with AT&T having a filed motion and then you doing

11 an oral response, and then, if you, I guess if you wanted to

12 follow with, if you wanted to follow up later with something on

13 paper and we gave you a certain deadline and then you could if

14 you got time to and then if not -- I just hate -- I just want

15 you to know that if you're waiving that right to file something

16 in response and would just make your arguments orally today,

17 that you understand that and you're okay with that.

18 MR. MALISH: I'm okay with that.

19 MR. CARVER: Well, if I may, I would like to

20 summarize my motion then. I understand you said you hadn't

21 read it, so I'd like to at least express --

22 COMMISSIONER McMURRIAN: Oh, absolutely. I wouldn't

23 make a ruling today anyway.

24 MR. CARVER: Okay.

25 COMMISSIONER McMURRIAN: But what I'm saying is you

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1 filed something on paper. And as I understand Mr. Malish, he

2 would prefer just making his response orally today and so I

3 have one filing that I can review later, but all I would have

4 for Mr. Malish would be the statements he makes here today. I

5 just want to make sure he understood that.

6 MR. CARVER: Okay.

7 COMMISSIONER McMURRIAN: But if you both are okay

8 with that, then I'll take oral argument, I guess five minutes

9 each. Is that -- Ms. Helton or Ms. Tan? And then we'll take

10 it under advisement and we'll issue a ruling later, perhaps in

11 the Prehearing Order.

12 Mr. Carver.

13 MR. CARVER: Thank you. Actually, despite all the

14 activity in this case, what it boils down to is, from a legal

15 standpoint is something really pretty simple. There's an

16 interconnection agreement between the parties which says that

17 if a dPi end user ordered something that would qualify them for

18 a promotional discount if they were a BellSouth user, then they

19 get the promotional discount.

20 In this particular case what we're arguing about is

21 the line connection charge waiver, and that waiver says that

22 the line connection charge is waived when a customer orders a

23 variety of things or possibility, but the one that's really

24 relevant is when the customer orders service, basic local

25 service and two features.

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1 Now our position is that dPi can't prevail for three

2 reasons. One is because what they have submitted are not

3 features, they're blocks of features. In other words, they

4 haven't submitted Call Return or Call Waiting, they've

5 submitted blocks of those things.

6 The second reason we believe they can't compel --

7 they can't prevail is because the tariff requires that there be

8 two purchased features. And what they have submitted again are

9 blocks that are available at no charge so there is no purchase.

10 The third reason we think they can't prevail, and

11 this is what the discovery really goes to is this third reason,

12 is because what we believe, in fact, what we know because

13 they've admitted this on the record in North Carolina after

14 they were compelled to answer the questions, is that when a dPi

15 customer signs up for basic service, the dPi customer has added

16 to their lines without their knowledge or their consent blocks.

17 In other words, they want basic local service and dPi blocks

18 their ability to order anything. They don't tell the customer

19 they've done that, they don't get the customer's consent, they

20 don't tell the customer after the fact, but that's what they

21 do. They don't charge the customer anything for the block and

22 they don't pay BellSouth anything for the block. And if they

23 get the promotional credit, then they keep their credit. They

24 don't give it back to the customer.

25 Our belief is that those circumstances are so

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1 fundamentally different than what our customers order that they

2 can't possibly be considered comparable. Those facts that I've

3 just recited, the ones that we know to be the case because they

4 were, they came out during North Carolina, we have tried to

5 establish those through discovery in this case. And every

6 single request for admission, every single interrogatory that's

7 at issue here goes to one of those elements. It's the heart of

8 our case.

9 Again, we think there are three reasons why they

10 can't prevail, but this is one that's very important and is

11 very central. And what we're simply trying to do is establish

12 what their actions were. Because the only way you can really

13 judge whether they qualify under the promotion and whether we

14 have a contractual obligation to give them a credit is to

15 determine things like whether their customer actually ordered

16 anything, whether their customer purchased anything, whether

17 the customer had something added without their knowledge, and

18 also whether the blocks are features. So what we've done is

19 we've tried to establish these same facts that went into

20 evidence in North Carolina because we believe that that's the

21 only way that you can get a full picture of their actions and

22 that's the only way that, that you can see what really happens

23 so that you can make a determination.

24 So we sent 20 requests for admission to dPi and we

25 sent about 35 interrogatories, 40 interrogatories. I don't

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1 remember the precise number. A lot of the interrogatories

2 simply tracked the request for admissions. We said, you know,

3 if you, if you object -- well, I'm sorry. If you deny the

4 request for admissions, then tell us why. So we have nine

5 requests for admissions, we have nine interrogatories that are

6 asking for follow-up to those, and then we have a handful of

7 other interrogatories, but every single one of them relate to

8 one of these things that I've just talked about. And I'm going

9 to just read them from the motion to give you a more specific

10 example.

11 Request for admissions Number 9 and 11, we request

12 dPi to admit that they placed blocks on all customer lines and

13 the customers did not request the blocks, and I'm reading from

14 Page 4 of the motion. We asked them to admit if dPi did place

15 blocks without a customer request, we asked them to admit that

16 they didn't obtain the customer's consent or inform the

17 customer. Request Numbers 13, 14, 15, and 17 are just more

18 specific requests. Like, for example, we say if the customer

19 orders Call Return, then do you not block Call Return? If a

20 customer orders Call Waiting, do you vary from your usual

21 process and not order Call Waiting? We asked them if customers

22 are allowed to order, you know, Touchstar features or, in other

23 words, what we define as Touchstar features. So do they, can

24 they order them or do they just block every customer every

25 time? So we believe it's relevant.

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1 I believe it's relevant for another reason too and

2 this is something that is important. This is specifically

3 addressed in their testimony. If you look at the amended

4 testimony of Mr. Bolinger, on Page 3, Footnote 1, he describes

5 their service offerings. And the way he describes it is he

6 says that dPi presents to their customers a service offering

7 compared -- I'm sorry -- comprised of the basic local service

8 and two features or two blocks. So I think inasmuch as that's

9 in his testimony -- I think I should be entitled to ask this

10 under any circumstances. But given the fact that he has

11 specifically addressed this in his testimony, that he talks

12 about their service offerings, I think I'm certainly entitled

13 to follow up and inquire about it. He also says in that same

14 footnote that customers are allowed to order other features,

15 and that's what the other discovery goes to.

16 And, finally, the last piece of it is I've asked --

17 pardon me. I've asked whether the discounts are passed on to

18 the customers because in another portion of his testimony, in

19 Page 2 or 3, he goes through this rather elaborate scenario

20 whereby he concludes that we're trying to harm their end users.

21 So if he says that their end users are going to be harmed by

22 our not giving them the credits, then I think it's certainly

23 legitimate to ask whether they passed the credits on.

24 So, again, this is the heart of our case, this is

25 something that's specifically raised in their testimony, and

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1 it's something that we believe is relevant by any standard.

2 Thank you.

3 COMMISSIONER McMURRIAN: Thank you, Mr. Carver.

4 Mr. Malish.

5 MR. MALISH: Hi, Commissioner. Thank you.

6 Generally speaking, we have objected to everything

7 that they've asked about that goes to what we charge our

8 customers for the service they get from us, and that's entirely

9 appropriate because that's completely irrelevant to the issues

10 that are teed up in this case.

11 The issues in this case are simply what does

12 BellSouth charge its end users and what service does BellSouth

13 provide its end users? Because whatever it provides to its end

14 users dPi can get. End of story. So, for example, if, if

15 BellSouth provides the LCCW to certain customers in a certain

16 way at retail, we're entitled to get that at wholesale, and it

17 simply doesn't matter whether we pass those on or don't pass

18 those on, whether we give them a bigger discount or less of a

19 discount or no discount at all. What goes on between dPi and

20 its end users frankly has nothing to do with the price and the

21 service that -- or legally anyways, it's not legally relevant

22 to what price dPi is entitled to get when it purchases things

23 at wholesale from BellSouth.

24 And so this list of, I didn't add it up, but, you

25 know, it's a whole line of numbers, I mean, you know, 20 or 30

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1 things they have requested all goes to what do you do with your

2 customers, what does dPi do with its customers? And, frankly,

3 that's just completely irrelevant. And because it's completely

4 irrelevant it won't help in any way decide the question of what

5 BellSouth provides its end users at retail and, therefore, what

6 we are allowed to purchase at a wholesale discount, we

7 shouldn't have to answer that at all. Under Florida Rule of

8 Civil Procedure 1.280 we would be entitled to a protective

9 order under subpart, I guess this is (g). It's blacked out on

10 mine. I'm having a hard time reading it. But it's under

11 protective orders.

12 "In order to protect a party or a person from

13 annoyance, embarrassment, oppression or undue unburden or

14 expense, the tribunal may decide that certain matters not be

15 inquired into or that the scope of the discovery be limited to

16 certain matters." So what we have here is this huge red

17 herring. As you can see, you know, it's not just one or two or

18 three questions, it's 20 or 30 questions, all requiring us to

19 dig up and share information on something that's completely

20 irrelevant and can never be relevant to Issue Number 1 that has

21 to be decided by the Commission in this case. It doesn't

22 matter what we charge at the end of the day to our end users.

23 I mean, by logical extension what they seem to be saying is

24 anything that you get from SBC or, excuse me, BellSouth, now

25 AT&T, you have to pass that on to your customer. So,

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1 therefore, if you buy something at resale, regular garden

2 variety, ordinary service at resale, whatever the -- what is

3 the discount rate here, probably 21 percent -- you have to pass

4 that along to your end user. And, of course, that's not true.

5 The price that dPi pays at wholesale is, as a legal matter,

6 completely unlinked from what they charge their customers, what

7 dPi charges its customers at retail. It simply doesn't matter.

8 And so there's no point going down this rabbit trail of

9 answering all these questions for something that just doesn't

10 matter at the end of the day. I mean, the whole purpose of

11 this, I would suppose, would be to say, look at these

12 promotions they're taking advantage of, if this is true, if

13 this is how it actually plays out, look at all these promotions

14 they're taking advantage of, they're getting a discount on this

15 promotion but they're not extending it to their own end user.

16 Just like will they get a discount by buying at wholesale but

17 they're not giving that to their end user. Well, that's the

18 arbitrage. I mean, that's what the whole reseller system is

19 based on.

20 COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

21 MR. CARVER: Commissioner, I won't ask to respond,

22 but I do want to make one clarification because I think I

23 misstated something about the testimony.

24 COMMISSIONER McMURRIAN: Oh, so you want to correct

25 something you stated earlier?

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1 MR. CARVER: Yes. Yes.

2 COMMISSIONER McMURRIAN: Okay.

3 MR. CARVER: Okay. I was telling you about the

4 portions of Mr. Bolinger's testimony that refers to this

5 specifically, and it's his first amended testimony Page 3,

6 Footnote 1. That's where he describes the dPi offerings.

7 COMMISSIONER McMURRIAN: Okay.

8 MR. CARVER: What dPi charges its customers, that

9 reference is the first amended -- I'm sorry. That was the

10 first amended direct testimony, Page 3, Footnote 1, that I just

11 told you about.

12 COMMISSIONER McMURRIAN: Okay.

13 MR. CARVER: The other reference was to the first

14 amended rebuttal testimony, and it begins on Page 3, Line 4,

15 and it ends on that same page at Line 7. So that was the

16 reference that I meant to make earlier.

17 COMMISSIONER McMURRIAN: Okay. Thank you. Okay. We

18 will take that under advisement and issue a ruling later.

19 I believe. I believe that gets us through all the

20 pending motions. Am I correct?

21 MS. TAN: Yes. All that's left at this time would be

22 pending confidentiality motions.

23 COMMISSIONER McMURRIAN: Okay.

24 MR. MALISH: I have a housekeeping question.

25 COMMISSIONER McMURRIAN: Sure.

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1 MR. MALISH: On, for example, the motion to strike

2 that we filed with regards to Ms. Tipton, Ms. Tipton's

3 testimony, is there going to be an opportunity for oral

4 argument like we just did on this one in connection with that

5 one?

6 COMMISSIONER McMURRIAN: I wasn't planning on it, I

7 guess, because I was, because it was filed just yesterday. I

8 was going to give AT&T an opportunity to file on paper.

9 MR. MALISH: The reason that I ask is because the way

10 that I read the rule is that if we have an objection to the

11 testimony, we have to have it on file before today's hearing

12 that we're doing right now. And the way things were originally

13 scheduled, we were going to be taking Ms. Tipton's deposition

14 this morning prior to this hearing right now. It hasn't

15 happened that way so far. The reason that I bring it up is

16 because we will be ascertaining things during her deposition in

17 which she will be admitting that she doesn't have first-hand

18 knowledge about any of this stuff and all of her knowledge is

19 hearsay evidence.

20 I can produce transcript testimony from North

21 Carolina and I can produce deposition from North Carolina on

22 this issue, but I had hoped to have, to have been able to have

23 presented to the tribunal that -- you know, a deposition from

24 here in Florida. So I guess at this point it would be

25 supplementing something after the fact rather than having it

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1 for you before you actually take it up. That's why I asked.

2 COMMISSIONER McMURRIAN: So what I hear you saying is

3 some opportunity for oral argument, not today because you want

4 to --

5 MR. MALISH: At any point before y'all make the

6 decision.

7 MS. HELTON: Commissioner, that's not typically our

8 practice to provide opportunities for oral argument when

9 motions are filed. And, in fact, I think that -- I was going

10 to say that I think that our rules require oral argument

11 requests, but our rule was recently amended and, quite frankly,

12 I can't remember if it requires it for these types of motions

13 or not, so I better not go down that path. But that's not our

14 practice. For typical discovery type matters or prehearing

15 matters like this we don't -- usually the motion and the

16 response by the opposing party is sufficient and I'm not sure

17 that oral argument is necessary.

18 As far as the timing goes, we put the requirement in

19 the Order Establishing Procedure to file motions to strike of

20 prefiled testimony prior to the time of the prehearing

21 conference to avoid these types of issues at the hearing. We

22 found that they were taking up way too much time, and the

23 preference was to get to the meat of the matter and not deal

24 with motions to strike there. So the goal by requiring motions

25 to strike by the time of the prehearing conference was so that

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1 they could be ruled on by the time of the hearing and the

2 parties could go forward.

3 MR. MALISH: Basically then what I would like to be

4 allowed is to have leave to amend, to, if necessary, to include

5 portions of the transcript from the North Carolina proceedings

6 in which Ms. Tipton admits that she has no personal knowledge

7 of the events that go to the heart of this matter. If my

8 motion without is inadequate, it would otherwise be considered

9 inadequate without having that evidence. Again, the reason

10 that I didn't bring it with us is because I had hoped to have

11 it developed during her deposition this morning, but, of

12 course, we haven't had a chance to take her deposition yet, so.

13 COMMISSIONER McMURRIAN: But the information that

14 you're referring to from North Carolina, that's already

15 happened. I mean, their proceeding is already further along

16 than ours.

17 MR. MALISH: Right.

18 COMMISSIONER McMURRIAN: So in your motion to strike

19 you don't address what's happened in North Carolina?

20 MR. MALISH: Well, I didn't include portions of the

21 transcript. We just said that --

22 MR. CARVER: I don't mean, I don't mean to interrupt,

23 but I would like to be heard when it's my turn, please.

24 COMMISSIONER McMURRIAN: Sure. I'll let him finish

25 his thought and I will give you a chance to --

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1 MR. MALISH: What we have done is we have just stated

2 that, we have just stated that she has no personal knowledge of

3 the facts contained within her testimony, is not presented or

4 qualified as an expert.

5 The actual -- I had hoped to be able to provide y'all

6 with, you know, deposition testimony from this morning, you

7 know, the current most up-to-date thing to back that up. I do

8 have copies of testimony from North Carolina that could also do

9 that, which I guess I could, you know, pull out of my packet

10 and attach to this right now before the, before the thing is

11 over. But, again, it's from North Carolina and it's not from

12 Florida. Whether that matters to y'all, I don't know. But I

13 would have preferred to give you something out of this case in

14 which she admits that she doesn't know anything from her own

15 personal knowledge, and what she knows she gets from having

16 quizzed other people or read other people's documents.

17 COMMISSIONER McMURRIAN: I probably shouldn't but I'm

18 going to ask this anyway. How were you going to include

19 information from this morning's deposition at this afternoon's

20 prehearing?

21 MR. MALISH: Well, I was going to say during her

22 deposition she admits that this has happened, and as soon as we

23 get a transcript we can show you.

24 The reason that this is important is because under

25 y'all's rules, under 28-106.213 regarding evidence, (3),

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1 hearsay evidence, the provision that we're relying upon here is

2 that hearsay evidence, whether received in evidence over

3 objection or not, may be used to supplement or explain other

4 evidence, but shall not be sufficient in itself to support a

5 finding, unless the evidence falls within an exception to the

6 hearsay rules found in Chapter 90 of the Florida Statutes.

7 We know from having been through this proceeding

8 elsewhere, namely North Carolina, that Ms. Tipton is

9 essentially an employee of BellSouth. And we refer to her as a

10 trained witness, and I know that they take, you know, offense

11 at that, but the fact of the matter is that her job is to go

12 investigate things and then provide a report. So instead of

13 presenting the individuals that were actually involved in these

14 dealings at the time, they send a person to go make an

15 investigation. We are forced into dealing with that person as

16 opposed to the actual source of the knowledge. And, you know,

17 so we know as a matter of record already that she has no

18 personal knowledge of the facts that go to the LCCW waiver

19 dispute because she's admitted it in the past. Now she may

20 change her testimony here in Florida, I don't know, but that's

21 one of the things that we're trying to pin down.

22 COMMISSIONER McMURRIAN: Mr. Malish, I just want to,

23 I want to -- I've afforded you a lot of latitude, but we talked

24 earlier about whether or not to have oral argument. I did ask

25 you a question and so I sort of invited more discussion there,

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1 and I do want to give Mr. Carver a chance to speak up on this,

2 but I don't really want to get into oral argument on the motion

3 to strike.

4 I guess what I'm trying to deal with is the

5 procedural question of -- I think what you're asking, is there

6 any way for you to add to your motion to strike at this point.

7 And you're saying that you were trying to abide by what the OEP

8 set out and to make a filing by today. But I think that, it

9 sounds like the information that you're even talking about

10 adding is something that you could have added yesterday, quite

11 frankly, the North Carolina information.

12 MR. MALISH: Well, I can add it right now.

13 COMMISSIONER McMURRIAN: Well, hold on. Hold that

14 thought and let me hear from Mr. Carver, and then we'll hear

15 from staff about whether or not there's any way for you to

16 amend your motion to strike somehow now.

17 Mr. Carver.

18 MR. CARVER: Thank you. I'm not going to respond to

19 the substance because I haven't even read the motion yet, it

20 was filed very late yesterday, but there are a couple of points

21 I want to make.

22 Mr. Malish has known that he's had this concern with

23 Ms. Tipton's testimony since the North Carolina case was tried.

24 That case was tried March the 1st, 2006. When she testified in

25 North Carolina, he objected to her testimony going into the

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1 record at that time. I don't think he filed a formal motion to

2 strike, but he had a problem then, he argued it before the

3 Commission, he lost. If he knew he was going to argue it again

4 before this Commission, he's had a year and a half to get ready

5 for it because it was literally March 1st when it happened.

6 Instead of filing this in a timely fashion, he waits until

7 5:00 the day before the prehearing to file this. So at this

8 point there is a tremendous delay and the delay is entirely

9 attributable to dPi.

10 Beyond that, he said that he wanted to use the

11 deposition this morning. Well, the deposition was originally

12 set by staff. DPi didn't even set the deposition until he

13 cross-noticed it, I believe, yesterday afternoon. And this

14 case came out of abatement some time ago. He's had three or

15 four months, and he could have set Ms. Tipton's deposition at

16 any time if he wished to, but he didn't. So at that point

17 having had this transcript, the one I'm holding, for a year and

18 a half and not setting the witness's deposition, I just think

19 from an equitable standpoint there's no reason to allow him to

20 amend.

21 COMMISSIONER McMURRIAN: And, Mr. Carver, you're not,

22 from what I hear you saying, since you haven't read this motion

23 yet you're not prepared to give any oral argument on this

24 today.

25 MR. CARVER: No. All I, all I know is Ms. Tipton is

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1 basically functioning the same way as pretty much every company

2 witness at every Commission hearing for years and years. But

3 beyond that, I don't know the specifics of his objection to

4 that practice.

5 COMMISSIONER McMURRIAN: Well, I'd, I'd prefer not to

6 get into any more oral argument than we've already had on

7 whether or not Ms. Tipton's testimony should be allowed. And

8 I've already afforded a lot of latitude to both of you and I've

9 created some confusion there.

10 MR. CARVER: I apologize.

11 COMMISSIONER McMURRIAN: It's quite all right, both

12 of you, because I, again, I think I sort of opened up the door.

13 But I think, given, and we talked about this earlier,

14 Mr. Malish, on the other motion that came in yesterday you sort

15 of volunteered to orally argue it here today instead of filing

16 a written motion, but I would have given you the opportunity to

17 do it in writing, and that's what I think that -- before I came

18 in here today I planned to give you both an opportunity for the

19 motions that were filed yesterday to file a response in writing

20 in a few days. And if BellSouth or AT&T Florida, I have a lot

21 of trouble with that too, were prepared to do that today --

22 MR. CARVER: So do I.

23 COMMISSIONER McMURRIAN: -- if they were prepared to

24 do that today, we could do it that way and then take it under

25 advisement. But I really think it's just a substitute for

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1 having the opportunity to have a written filing. And normally

2 we would afford more time for a response, but I think in this

3 case because we're getting so close to the hearing we're not

4 going to be able to give the normal amount of time for

5 responses.

6 Ms. Helton or Ms. Tan, do you have any thoughts as --

7 I think you've already addressed the oral argument issue.

8 MS. HELTON: I think at this point it would be

9 appropriate to set the time specific for AT&T to file a written

10 response to the motion to strike and we could go forward with

11 the prehearing.

12 COMMISSIONER McMURRIAN: And we talked about this a

13 little bit earlier and I think we talked about Monday. But

14 perhaps Friday. Can you do Friday?

15 MR. CARVER: Yes. If I can have until the end of the

16 day, then, yes, I can do Friday.

17 COMMISSIONER McMURRIAN: And, Ms. Helton, I'm going

18 to bring it up again. Procedurally is there any way for a

19 party to in essence amend a motion to strike? I mean, I think

20 that -- frankly, I think that it creates some burden on the

21 other party to respond if the target keeps moving, quite

22 frankly, Mr. Malish, and that's sort of the reason for having

23 some deadline for filing a motion so that then we have --

24 MR. MALISH: Well, if I may respond. In this

25 particular case, Mr. Carver has already said that he hasn't

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1 even seen it yet, so he doesn't know what's in it. So he can't

2 be prejudiced if he gets it before the end of the day

3 presumably. I have copies of it here. I just need to make

4 copies. And all he will be seeing is the actual portions of

5 the depositions in, in Georgia and in North Carolina where Ms.

6 Tipton says, admits that she doesn't have personal knowledge.

7 The, the written motion contains the motion, it just

8 doesn't contain any, you know, evidence because it's supposed

9 to be an argument, this is our motion, this is our argument.

10 And --

11 COMMISSIONER McMURRIAN: But, Mr. Malish, I think

12 that's the reason we have the deadlines. I mean, you have the

13 ability to file whatever information you have at the time in

14 whatever motion you put forth before the Commission. So in my

15 opinion and from the things you've said you could have included

16 with your motion to strike attachments or exhibits and things

17 like that and you didn't.

18 MR. MALISH: Well --

19 COMMISSIONER McMURRIAN: I think that it's probably

20 best we move on. I had asked Ms. Helton a question, and so

21 I'll give her a chance to give input, and then I think we

22 should move on.

23 MS. HELTON: I was looking for the reference in the

24 order establishing procedure and I can't find it promptly, but

25 I think it requires a motion to strike to be filed prior to the

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1 prehearing conference. It sounds to me as if Mr. Malish has

2 had sufficient time to do that. I think we're in Florida now,

3 not North Carolina, and I would -- my suggestion to you would

4 be that he not be allowed to amend, but that AT&T be allowed to

5 respond by -- I think Mr. Carver has agreed to the end of

6 Friday, close of business on Friday.

7 COMMISSIONER McMURRIAN: And Mr. Malish and dPi will

8 have -- I guess given -- depending on the outcome, I guess, of

9 the motion to strike, there will, there will possibly be

10 further opportunities to take issue with testimony, if it does

11 proceed.

12 MS. HELTON: By inserting the requirement to file

13 motions to strike prior to the prehearing conference, it in no

14 way limits the parties' abilities to raise any type of

15 evidentiary objections during the course of the proceeding.

16 COMMISSIONER McMURRIAN: And, Mr. Malish, if you have

17 further questions, procedural questions and all about those

18 issues, again, I encourage you to talk with Ms. Tan or

19 Ms. Helton offline. Again, I think we're always more than

20 happy to help procedurally, understanding our rules and

21 procedures here and how they may differ. We definitely want to

22 help you out.

23 MR. MALISH: Thank you.

24 COMMISSIONER McMURRIAN: Moving along to pending

25 confidentiality motions. Ms. Tan.

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1 MS. TAN: There are three pending confidentiality

2 requests at this time, all of which will be addressed by

3 separate order.

4 COMMISSIONER McMURRIAN: Any questions or concerns?

5 MR. CARVER: If I could add one thing I hope will be

6 helpful. What we've designated as confidential is for the most

7 part dPi information that has to do with their accounts. I

8 know a lot of times handling confidential information during a

9 hearing can be cumbersome, so I just wanted to say that we've

10 only requested for confidentiality to try to protect their

11 information. If they want it to be -- you know, if they don't

12 want it to be confidential, then they can certainly waive that

13 and it would make things easier. If they want it to be

14 confidential, that's fine. But, again, we've only made the

15 request to try to protect them.

16 MR. MALISH: If it'll streamline the position or,

17 excuse me, the proceeding, we'll be willing to waive it on

18 those particular issues because it's just not that important.

19 COMMISSIONER McMURRIAN: Is that on all three pending

20 confidentiality requests?

21 MR. MALISH: Yes. Correct.

22 MR. CARVER: Well -- I'm sorry. The first one,

23 Number 1-22 of AT&T Florida's response to dPi's request for

24 information, that is AT&T information that needs to remain

25 confidential.

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1 COMMISSIONER McMURRIAN: Okay. So the one that's

2 listed Number 1?

3 MR. CARVER: The last part of Number 1. I think

4 everything else in Number 1 is dPi information.

5 Going through -- in other words, 1-3, 1-16 and 1-17

6 is dPi. 1-22 is AT&T, and we do need for that to be treated

7 confidentially.

8 COMMISSIONER McMURRIAN: Okay. And then Number 2 and

9 Number 3, that's also --

10 MR. CARVER: Waived.

11 COMMISSIONER McMURRIAN: No, that wouldn't be. All

12 right. Let's take them one at a time.

13 So under pending confidentiality matters on Page 9

14 the first item, as I understand it, AT&T Florida's response to

15 dPi's request for information Numbers 1-3, 1-16 and 1-17 are

16 with respect to information that you believe that dPi wants to

17 keep confidential. And if they're willing to waive that, then

18 that portion of the request could be made moot?

19 MR. CARVER: Yes, that's correct.

20 MR. MALISH: And we waive that.

21 COMMISSIONER McMURRIAN: Okay. And with respect to

22 1-22, that's information you still seek to keep confidential.

23 MR. CARVER: Yes, ma'am.

24 COMMISSIONER McMURRIAN: Okay. And then Number 2,

25 direct testimony of Pam Tipton, Exhibit PAT-3.

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1 MR. CARVER: It would take just a moment to check.

2 COMMISSIONER McMURRIAN: I assume that's AT&T

3 Florida's request; right?

4 MR. CARVER: Yes. That would be dPi information

5 also. So if they want to waive that, that's okay with us.

6 COMMISSIONER McMURRIAN: And, Mr. Malish, I just want

7 you to understand I'm not trying at all to pressure you to

8 waive confidentiality.

9 MR. MALISH: Well, we're just waiving with respect to

10 these particular things, so, yeah.

11 COMMISSIONER McMURRIAN: Okay. So you do waive with

12 respect to Ms. Tipton's testimony exhibit PAT-3?

13 MR. MALISH: Correct.

14 COMMISSIONER McMURRIAN: Okay. So we'll show that as

15 moot. And Number 3, AT&T Florida's response to staff's first

16 request for production of document request Numbers 3 and 6, is

17 that also dPi information?

18 MR. CARVER: Yes, it is.

19 MR. MALISH: We waive it.

20 COMMISSIONER McMURRIAN: So we'll show that one as

21 moot as well.

22 So that only leaves the response to dPi's request for

23 information 1-22, and we'll rule on that later. Thank you.

24 I probably should note if anyone decides to use

25 anything that is determined confidential at the hearing, it's

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1 normal practice to let the attorneys know as soon as possible

2 just so that we can plan for how to make sure the information

3 remains confidential throughout the course of the hearing. We

4 use red folders and such.

5 MS. TAN: Right. And staff would just direct the

6 parties to look at Section VII of the Order Establishing

7 Procedure, which is titled Use of Confidential Information at

8 Hearing.

9 COMMISSIONER McMURRIAN: It seems like that's not

10 going to be as much of an issue as we thought, but thank you

11 all again.

12 Section XIII on posthearing procedures. There is one

13 reference in the Prehearing Order that I think we probably need

14 to clear up. On Page 10, if I'm looking at the right copy, the

15 very last paragraph before the ruling section, and it

16 references briefs, a total number of pages of 40, but I believe

17 in the OEP on Page 8, the Order Establishing Procedure, we

18 originally set that out as 20 pages. Any concerns with that?

19 MR. MALISH: That's fine by dPi. 20 pages?

20 COMMISSIONER McMURRIAN: 20 pages, uh-huh. And we'll

21 correct that before we send out the final version, but --

22 MR. CARVER: Could we have 25?

23 COMMISSIONER McMURRIAN: Any objection?

24 MR. MALISH: No objection. I'm assuming that doesn't

25 account for like attachments like exhibits or something like

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1 that.

2 COMMISSIONER McMURRIAN: Ms. Tan, I'm not sure of the

3 answer to that question. Do we usually have attachments to

4 briefs? Is there any prohibition?

5 MS. HELTON: I've been trying to think back to

6 attachments on briefs and I can't recall seeing any. I mean, I

7 think the typical practice would be to refer to an exhibit in

8 the record, that's what should be attached, and you could just

9 refer us to the exhibit number that's established at the time

10 of the hearing. And we have those exhibits or will have those

11 exhibits here, the Commissioners will have those exhibits here.

12 There's no need to file an attachment. That I think just

13 wastes paper.

14 MR. MALISH: Yeah. I've done it in the past just so

15 that someone can flip right to it instead of having to go dig

16 something out, especially if it was something fairly small, but

17 --

18 MS. HELTON: And that's appreciated, but I don't

19 think it's necessary here in Florida.

20 COMMISSIONER McMURRIAN: Mr. Malish, that's my

21 understanding as well. I just, you know, frankly it's probably

22 more work for you than you need to do. And as I understand it,

23 it should just be limited to the things that are already in the

24 record, unless perhaps you were referencing some order of the

25 Commission or something like that that would be possible to

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1 reference.

2 So 25 pages. And we are able to amend that here.

3 I'm able to amend that.

4 MS. HELTON: Yes.

5 COMMISSIONER McMURRIAN: Okay. And I understand that

6 AT&T has asked for a change in the due date for briefs.

7 Mr. Carver?

8 MR. CARVER: Yes, ma'am. I think there are two weeks

9 of what's allowed in the schedule, and we'd like to request an

10 additional week, so it would be 21 days. In other words,

11 rather than October 15th, it would be October 22nd.

12 COMMISSIONER McMURRIAN: Mr. Malish, do you have any

13 objection? The due date for the briefs after the hearing is

14 now scheduled for October 15th according to the Order

15 Establishing Procedure, but Mr. Carver is suggesting moving

16 that to a due date of October 22nd.

17 MR. MALISH: Generally speaking -- sorry. Generally

18 speaking, we don't have an objection to that. I was curious as

19 to whether, whether there's any sort of account taken with

20 regard to how long it takes to get a transcript generated from

21 the hearing. Is it --

22 COMMISSIONER McMURRIAN: I believe we have a

23 transcript deadline that's associated with --

24 MR. MALISH: Is it like three weeks from when the

25 transcript comes out or is it just three weeks from the

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1 hearing, period, even if the transcript doesn't come out until

2 a day before the three weeks is over?

3 MS. HELTON: That date would have been established

4 internally, and I think Ms. Tan is checking to see what that

5 is, unless Ms. Boles knows.

6 Typically, I mean, the maximum that usually we allow

7 our court reporters, our wonderful court reporters is two

8 weeks, but they often do a great job getting it to us before

9 then. This is set for one day or two days?

10 COMMISSIONER McMURRIAN: I believe it's one day.

11 MS. TAN: It's set for one day. I believe testimony,

12 I mean, the testimony transcript for, I mean, excuse me,

13 hearing transcript, if I'm not mistaken, is due October the

14 8th, but I would, that would be subject to check.

15 MS. HELTON: So that sounds like about a week to me.

16 So you'd be getting the transcript within a week or a week plus

17 a day.

18 MR. MALISH: Yeah. That would be fine. So it's

19 basically two weeks after the transcript comes out. Yeah.

20 COMMISSIONER McMURRIAN: And someone on staff can

21 check. And I understand your depositions are continuing later

22 today, and they can get that date for you before the end of the

23 day and let you know for sure.

24 MS. TAN: It is the 8th at this time.

25 COMMISSIONER McMURRIAN: It's the 8th. Okay.

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1 MS. TAN: It's currently reflected as the 8th.

2 COMMISSIONER McMURRIAN: Okay. So the October 22nd

3 deadline for briefs would give you more time. Any objection,

4 Mr. Malish?

5 MR. MALISH: No objection.

6 COMMISSIONER McMURRIAN: Okay. All right. Show the

7 new due date for the briefs October 22nd. I guess that's close

8 of business.

9 And that brings us to the last section on rulings,

10 and I guess this brings us back to the discussion about opening

11 statements.

12 MS. TAN: Staff's recommendation would be ten

13 minutes.

14 COMMISSIONER McMURRIAN: And just from memory, I

15 believe we had -- Mr. Carver said ten minutes was adequate and,

16 Mr. Malish, you said --

17 MR. MALISH: I was asking for 20. I find that a

18 comprehensive opening ends up streamlining the whole process

19 and shortens the amount of, the entire amount of time needed

20 for the hearing because it focuses the decision-makers on, you

21 know, the parts of the story that they have the most interest

22 in and where they need to get the meat out if it's not already

23 presented before them. So that's why I asked. I think that it

24 sounds like a lot, but in the end it saves time. So that's why

25 I asked for 20 minutes.

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1 MR. CARVER: And my objection to that, Mr. Malish

2 earlier mentioned the PowerPoint presentation. It sounds like

3 he has something fairly elaborate planned. And I don't have a

4 problem with an opening statement for the attorneys to sort of

5 lay out in general what their case is, but I think it serves

6 everybody's interest to avoid a situation were the attorneys

7 are testifying at great length. So, I mean, to have counsel

8 for one party spend 20 minutes going through a PowerPoint

9 presentation and essentially arguing the evidence that hasn't

10 been admitted yet on a two-issue case, I don't really think

11 that's the best use of the Commission's resources. So to me I

12 think it's better to have a short one and move on.

13 MR. MALISH: Well, Commissioner, I mean, you know,

14 whether it's with a PowerPoint or not, obviously the only thing

15 that's being put out there is this is what we expect the

16 evidence to show and this is what you should look for and this

17 is where to find it. And, of course, it's easier to process

18 information if you see it both, you know, if you both see it

19 and hear it as opposed to just one or the other.

20 COMMISSIONER McMURRIAN: Mr. Malish, I missed the

21 part about the PowerPoint, so I did want to clarify you do

22 intend to use the PowerPoint? I just think that we need to be

23 prepared for any setup issues with respect to that. And I did

24 want to ask our staff, are there any problems with using a

25 PowerPoint in the presentation?

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1 MS. HELTON: I think that might be best -- we might

2 need to direct that question to Mr. Staden. I don't know,

3 given the technical difficulties we've had recently with the

4 system, whether that's something that we can do or not.

5 COMMISSIONER McMURRIAN: I'm glad you brought it up

6 now because those are the kind of things -- I mean, in the same

7 vein of getting some kind of notice about using demonstrative

8 exhibits, the purpose is just so that we can be prepared. But

9 we can work on that after the fact. I just, I was asking you,

10 Ms. Helton, if there are any procedural problems in using

11 PowerPoint. This is the first time I've had this come up in a

12 prehearing.

13 MS. HELTON: Can we take that under advisement and

14 let's think about it a little bit?

15 COMMISSIONER McMURRIAN: Yes. And as far as the

16 time, I think you're catching me in a generous mood today in

17 saying 15 minutes. My inclination is usually to keep it

18 shorter, Mr. Malish. I think ten minutes is usually a gracious

19 plenty, especially in a, in a two-issue case. But having heard

20 what you've said, 15 minutes, I think, is a reasonable amount

21 of time. And, of course, Mr. Carver, you would also get 15

22 minutes. And we will look into the issue of PowerPoint. But

23 I'm glad you let us know that you might be planning on using

24 that. Maybe if you could follow up, if you're not sure if you

25 plan to use it or not, but if you could let them know when

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1 you've decided and we can try to make sure if there are any

2 concerns.

3 MS. HELTON: And maybe, too, if we can have a

4 conversation, you know, I don't think it has to be now, you

5 know, when the prehearing conference concludes between dPi and

6 AT&T and staff to understand exactly what's going to be in the

7 PowerPoint presentation, how it would be used and whether AT&T

8 would have the same opportunity.

9 COMMISSIONER McMURRIAN: Ms. Helton, one more thing

10 about what was stated by Mr. Carver about having attorneys

11 testifying. I mean, that's something, that's another reason,

12 frankly, Mr. Malish, for keeping it a little bit shorter. What

13 are our procedural rules, for instance, on how much latitude

14 the attorneys have in their opening statements?

15 MS. HELTON: Well, obviously it has to be directed

16 towards what's the evidence that will be presented in the case,

17 and it is not appropriate for attorneys to use opening

18 statements as an opportunity to testify. It would not be --

19 it's supposed to be the groundwork for the case to help the

20 tribunal better understand what the evidence is that they're

21 going to be hearing and how it's relevant to the ultimate

22 resolution of the case.

23 COMMISSIONER McMURRIAN: And the same way with

24 witness testimonies, you wouldn't want your witness to get

25 outside the scope of the testimony that they've prefiled.

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1 Okay. Well, we will take several matters under

2 further advisement and get back to you all. And are there any

3 other matters to address in this prehearing conference before

4 we adjourn? Hearing none, this prehearing is adjourned. Thank

5 you.

6 (Prehearing Conference adjourned at 3:32 p.m.)

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1 STATE OF FLORIDA )

: CERTIFICATE OF REPORTER

2 COUNTY OF LEON )

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4 I, LINDA BOLES, RPR, CRR, Official Commission

Reporter, do hereby certify that the foregoing proceeding was

5 heard at the time and place herein stated.

6 IT IS FURTHER CERTIFIED that I stenographically

reported the said proceedings; that the same has been

7 transcribed under my direct supervision; and that this

transcript constitutes a true transcription of my notes of said

8 proceedings.

9 I FURTHER CERTIFY that I am not a relative, employee,

attorney or counsel of any of the parties, nor am I a relative

10 or employee of any of the parties' attorneys or counsel

connected with the action, nor am I financially interested in

11 the action.

12 DATED THIS \_\_\_\_\_\_ day of September, 2007.

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LINDA BOLES, RPR, CRR

15 FPSC Official Commission Reporter

(850) 413-6734

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