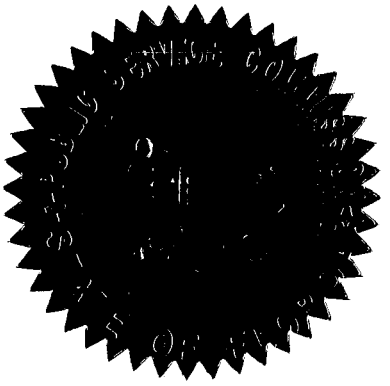
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 050863-TP

In the Matter of:

COMPLAINT BY DPI-TELECONNECT, L.L.C. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR DISPUTE ARISING UNDER INTERCONNECTION AGREEMENT.
_____/



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PROCEEDINGS:	PREHEARING CONFERENCE
BEFORE:	COMMISSIONER KATRINA J. MCMURRIAN Prehearing Officer
DATE:	Tuesday, September 18, 2007
TIME:	Commenced at 1:38 p.m. Concluded at 3:32 p.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	LINDA BOLES, RPR, CRR Official FPSC Reporter (850) 413-6734

APPEARANCES:

TRACY HATCH, ESQUIRE, AT&T, 101 North Monroe Street, Suite 700, Tallahassee, Florida 32301-1549, appearing on behalf of AT&T Florida.

J. PHILLIP CARVER, ESQUIRE, AT&T Florida, c/o Greg Follensbee, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32303-1556, appearing on behalf of AT&T Florida.

CHRISTOPHER MALISH, ESQUIRE, Foster Law Firm, 1403 West Sixth Street, Austin, Texas 78703, appearing on behalf of DPI Teleconnect, L.L.C.

LEE ENG TAN, ESQUIRE, and MARY ANNE HELTON, ESQUIRE, FPSC General Counsel's Office, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, appearing on behalf of the Commission Staff.

P R O C E E D I N G S

COMMISSIONER McMURRIAN: Call this prehearing to order. Staff, please read the notice.

MS. TAN: Pursuant to notice issued August 31st, 2007, this time and place has been set for an administrative hearing in Docket Number 050863, complaint by dPi Teleconnect, L.L.C., against BellSouth Telecommunications, Inc., doing business as AT&T, for dispute arising under interconnection agreement.

COMMISSIONER McMURRIAN: And now we'll take appearances.

MR. HATCH: Tracy Hatch appearing on behalf of AT&T Florida, along with Phil Carver, also appearing on behalf of AT&T Florida.

MR. MALISH: Good afternoon. It's Chris Malish with Foster, Malish, Blair & Cowan on behalf of dPi. And I have counsel and vice president for dPi, Brian Bolinger, with me.

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

COMMISSIONER McMURRIAN: Okay. Mr. Bolinger is a witness too; right? Am I correct?

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

COMMISSIONER McMURRIAN: Okay. Staff, are there any preliminary matters we need to address before we address the Prehearing Order?

MS. TAN: There are none.

COMMISSIONER McMURRIAN: Okay. We'll go through the Draft Prehearing Order now. Well, do the parties have any preliminary matters?

We'll go through the Prehearing Order at this time. I'll identify the sections, and I want the parties to let me know if there are any corrections or changes to be made. We may go through certain sections quickly, so please speak up if you have any changes or corrections to make me aware of.

Section I, case background, Page 1.

Section II, the conduct of proceedings.

Section III, jurisdiction.

Section IV, procedure for handling confidential information.

Hearing none, Section V, prefiled testimony and exhibits and witnesses. One thing I'll note under that section is five minutes is typically provided for witness summaries of testimony. Do the parties want to shorten or dispense with witness summaries or --

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

COMMISSIONER McMURRIAN: Okay.

MR. MALISH: And you normally allocate five minutes to that per witness?

COMMISSIONER McMURRIAN: Five minutes per witness.

MR. MALISH: That's fine.

COMMISSIONER McMURRIAN: Okay. Section VI, order of

witnesses. At this point I probably should ask, are the parties willing to stipulate any witnesses at this point? Hearing none. I also should ask whether the direct and rebuttal testimony can be taken up together. Do the parties have thoughts on that?

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

MR. MALISH: We would recommend it.

COMMISSIONER McMURRIAN: You would recommend it?

MR. MALISH: Yes.

COMMISSIONER McMURRIAN: Okay. Okay. Then we will show that in the final order.

Okay. Section VII, basic positions, any changes?

MR. CARVER: May I ask a question before we get to Section VII?

COMMISSIONER McMURRIAN: Sure.

MR. CARVER: And I apologize if I missed a section. But will there be opening statements at the hearing?

COMMISSIONER McMURRIAN: Yes. And I think that we usually address that at the end in the ruling section, but we can talk about it now.

MR. CARVER: Oh, sorry. Okay.

COMMISSIONER McMURRIAN: I think what we have in the draft is ten minutes, and we might as well take it up now. Do you -- is that sufficient?

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

MR. MALISH: Actually, you may not, may or may not be aware, but we've done this case, at least one precursor to this case in North Carolina, and I believe openings there took, and they were useful, but I believe they took approximately 18 to 20 minutes at least on our side, a PowerPoint and stuff like that to help sort of paint a big picture.

MR. CARVER: If I may, I mean, it's a one- or perhaps two-issue case, it's really not that complicated, and we believe ten minutes is sufficient.

COMMISSIONER McMURRIAN: Maybe we'll bring this back up at the end because we probably need to talk about how many issues we are dealing with. So we'll bring that back up at the end.

Section VIII, issues and positions on Page 5. Any changes or corrections or objections to any of the issues? It's probably a good time to talk about Issue 2. As I understand it, the parties were discussing possibly trying to negotiate something about Issue 2. And I'll give each you of an opportunity to address it, but have you been able to reach any kind of agreement as to Issue 2?

MR. CARVER: No, we have not. And I think what it comes down to is really sort of a question about the circumstances under which an issue can be dropped from a proceeding. And if I, if I may just explain briefly the situation we have.

When dPi originally filed their complaint, they identified four promotions. And one of those which had to do, which is called CRACKS (phonetic), sort of dropped out because that has essentially been resolved. So there were three remaining issues. The line connection charge issue is Issue 1 and the two other issues are Issue 2. When -- and these were identified, you know, as issues for the proceeding.

DPi chose not to address those in their testimony and they have now taken the position that they want to drop it from the case. And we don't have a problem with that, but our position is if they drop it from the case, then it should be dropped with prejudice. Because basically under the interconnection agreement between the parties, when we bill dPi for something, they can dispute it and then there's a dispute resolution process. These promotions that are addressed in Issue 2, like the one in Issue 1, have been the subject of disputes and, as a result of that, they've not paid for -- well, let me back up a bit. They take the promotional credits and they offset it against their bill. So this represents money that's not been paid for, in some instances, four or five years. This complaint was filed two years ago and a resolution on both the Issue 1 promotion and on the Issue 2 and 3 promotion have been pending for that entire time. That's why we filed testimony on it because we thought this was going to be dPi's day in court.

Our concern is if they drop Issue 2 out at this juncture, then when we get ready to basically rebill them and try to collect the money, then they're going to come back and say, no, sorry, these are disputed and they were removed from the case without prejudice so, therefore, you know, we don't have to pay. And in the context of our discussions earlier today when we were trying to work out the stipulation, I think it became clear that that's exactly what they plan to do.

So our position is now that this has been pending before the Commission for two years and we've delayed collection efforts for two years. You know, this is, so to speak, their day in court. If they don't want it, that's fine, but in that instance it should be dismissed with prejudice. We should not have to refile and relitigate disputed amounts that, again, in some instances the disputed debt is as much as four years old. Their position, as I understand it, is that they're free to dismiss it if they want with no restrictions and then we have to begin the process all over again.

So I don't think we have a dispute about whether or not it should come out, it's just the circumstances under which it, you know, would come out.

COMMISSIONER McMURRIAN: Mr. Malish, I'm sure you want to respond to that. I did see in some of your filings where you alluded to not wanting to litigate Issue 2 and had heard that you all were working on something. Is the source of

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

MR. MALISH: Exactly. To give you some background, as you know, these promotion disputes are just not in Florida, they're basically BellSouth territory-wide. And when the dispute for all states was initiated or basically came to a head there were the three main promotions: LCCW, line connection charge waiver, the SSCW, basically the other two in Issue Number 2. After this case was filed in North Carolina, BellSouth paid almost 100 percent of the issues that were, were the promotions that are included in Issue Number 2. And by the time we went to, went through discovery in North Carolina, it was literally 1 percent or less of the total amount in dispute. So it was approximately like one or two thousand dollars out of a hundred and some odd thousand dollars worth of disputes. And so basically it didn't, it didn't make economic sense to spend $5,000 or $10,000 litigating a $1,000 issue, and nor is that something that we wanted to dump on the Commission.

In Florida we did not -- because we don't know until they tell us what disputes are being paid and which ones aren't, because we don't know the answer to those questions until we go through the discovery, we weren't able to narrow the issues in Florida until we got that discovery back from them. And so here in Florida the percentage is bigger than it is in North Carolina, but, on the other hand, the total dollar amount in dispute is, is significantly smaller. It's

approximately half.

So still we're in a position here where the total dollar amount in dispute is approximately $10,000, plus or minus five, and it's just not economically sensible for us to spend the money to do all the discovery which has not really been done on the, on the contesting the, you know, whether it should be paid, whether it shouldn't be paid, and the, and the documents to back that up, the orders and so on and so forth to get to that.

And you may or may not be aware that this case was sort of moving slowly compared to other jurisdictions and then all of the sudden it leapfrogged to the front and at a point in time when discovery hadn't been completed. So that's one of the reasons why there were requests for continuances in order to make sure the discovery was in before we did the testimony, amended the testimony and so on and so forth. So we've had a limited amount of time. With the limited amount of time we have to get ready and the limited dollars at issue for the issues in Issue Number 2 or the promotions in Issue Number 2, you know, we're not prepared and nor do we think it's economically reasonable to litigate those at this point in time, so we're dismissing them without prejudice.

We still have a dispute because we don't have an agreement on, on whether the money is owing or not, but we are not compelled to bring that to the Commission. And, of course,

BellSouth has not made it a counterclaim, so they haven't brought it in on their own.

My understanding of the background rule is that we can withdraw anything without prejudice basically before it's heard. If that is untrue and there's a rule that prevents us from doing that, unless there's good cause, which I think I've demonstrated as it is, then, you know, I'll stand corrected. But nevertheless there's good cause to not hear it. If they want to hear it, if they want to have that litigated for that small amount, they are entitled to bring a case of their own, or if they had done so earlier, they could have counterclaimed in this case to preserve that as an issue to be discussed and dealt with. But they can't hold us to it in this particular case. And in any event, we would not be prepared to do so because we haven't had a chance to complete the discovery on those issues.

COMMISSIONER McMURRIAN: Thank you, Mr. Malish. This is a good time for me to turn to our staff attorneys and get their input on exactly what discretion the Commission has in this sort of instance and particularly with respect to any procedures that speak to with or without prejudice in this type of situation.

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

COMMISSIONER McMURRIAN: Anyone who wants to jump at that one.

MR. MALISH: Commissioner, I might be able to add something. Basically what we would have as a practical matter here in Florida is we would have a defense. This is not something that we're willing to litigate. We don't want to spend $20,000 to try to collect $10,000 from them; however, we believe we have a defense should they come after us for the $10,000.

I guess we would be willing to dismiss, to have the thing dismissed without prejudice or with prejudice, excuse me, as long as that doesn't affect our right to raise it as a defense should they bring a case either before the Commission or state or federal court. Do you see the problem we have?

COMMISSIONER McMURRIAN: I do see that as a different twist and I wasn't understanding that from what you originally said.

MR. MALISH: Right.

MS. HELTON: I think Mr. Carver wants to address that, and I would really be interested in hearing what he has to say there.

COMMISSIONER McMURRIAN: Go ahead, Mr. Carver.

MR. CARVER: I think that's sort of a distinction without a difference. I think he's saying that they would dismiss it with prejudice but they would still dispute it, which means they still wouldn't pay it, which would --

COMMISSIONER McMURRIAN: I hate to interrupt you, but

as I understood what he was saying, he was saying that if you brought a claim against them, that they would dispute it. I guess I see those two things as different about who's raising the issue, but help me understand.

MR. CARVER: Well, I think actually the way the process works, as I understand it in the interconnection agreement, is that we bill them and they dispute it. And what's happened with this is that they've taken their credit requests and they have offset them against undisputed debt. So region-wide there's approximately $1.7 million in services that we have rendered to them that they have not paid us for because they say that in the aggregate their credits offset that amount, and some of this debt is four, five years old. In the case there are facts that go back to 2003. So it's been out there for a long time.

Typically the way the process works is that, is that we bill them, they dispute the debt, there is a dispute resolution process. And if it isn't worked out that way, then we can begin collection procedures. And at that point -- and one of the collection procedures is to, you know, stop their access to ordering. And typically what happens, if someone thinks that the way it works under the interconnection agreement, if they believe the dispute is legitimate, then they file a claim with the Commission, assuming it's an interconnection agreement. Or if it's outside of the

Commission's jurisdiction for some reason, it could be state court. But the way the interconnection agreement is structured, it's typically incumbent upon the CLEC to file the action.

And the problem we have here is that's exactly what they did two years ago, and we didn't counterclaim because it's already before the Commission. There's no reason for us to file something that duplicates their complaint because, frankly, I mean, I've never seen a party try to do this before. I mean, there's no reason to think that you have to keep someone from withdrawing something at the eve of the hearing. But we've been moving forward, we've conducted discovery, we've filed testimony, we've put a lot of work into developing this case. I mean, if you look at Ms. Tipton's testimony, there's an analysis that reflects a lot of time to figure out what was due and to determine whether the credit requests were legitimate or whether they weren't. And we've checked and double checked and determined that they weren't, and now it's before the Commission and we just want a resolution.

At this point after two years the work has essentially been done. All we need to do is go to hearing. If at this point they've decided they want to drop the claim because it's a small amount of money and it's not worth the trouble -- and, by the way, I think it's, it's small, but I think it's probably more like 20 to $25,000, but it's small

either way. If they've decided it's not worth it to, to have whatever additional increment of labor would be involved to actually try this at the hearing, then that's their prerogative. They can drop it. But in that case the Commission should not allow them to do so without prejudice so that we now have to go back and put that back in the pot with the other $1.7 million and start all over again.

COMMISSIONER McMURRIAN: But I'm still maybe somewhat confused about the differences that -- I guess I'm not understanding the difference the same as you, Mr. Carver.

I thought what I heard Mr. Malish say was that he would be able to dismiss it with prejudice if they weren't prevented from, I guess from defending themselves if you brought a claim later, if AT&T brought a claim later.

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

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

MR. CARVER: My point is typically I don't think it works that way.

COMMISSIONER McMURRIAN: Okay.

MR. CARVER: Usually what happens is there's an escalation process that if it can't be resolved, then at that point we would begin collection procedures which would involve denying them access to ordering systems and ultimately cutting them off. And this has happened with dPi in other states, and

what they do at that point is they come before the Commission and then it's before the Commission on an emergency basis. And we're not, you know, we're not trying to cut them off prematurely, so we'll allow that to happen.

But I think as a practical matter what's going to happen is if you allow them to dismiss this and to preserve their claim that they don't have to pay the money, then we're going to go through the process the interconnection agreement allows us to go through and it's going to be back before the Commission probably in another month or two.

COMMISSIONER McMURRIAN: Okay. I see what you're saying. Mr. Malish, did you want to add anything to --

MR. MALISH: Well, I think it's a little bit misleading to state that there's $1.7, $1.7 million in dispute here. Really what we have here is approximately $850,000 in dispute, and that's, that's sector-wide.

COMMISSIONER McMURRIAN: And we don't have to decide any of that today.

MR. MALISH: Right. And what we're talking about is late fees on top of late fees that they're attempting to extract in addition to that.

I don't dispute that BellSouth or AT&T can bring a claim. They can bring a claim in this case, they can bring a claim outside of this case if they want to bring a claim to say that we are owed this money, we should be paid. They have

every right to do that, but they haven't. And we are not prepared to defend a claim like that in this case right now. If they want to amend to bring that claim, then we'll have to have a little bit of extra time to get prepared. And, you know, we can't be ready on October the 1st to talk about these two claims.

COMMISSIONER McMURRIAN: Okay. I'll turn to staff counsel now.

MS. HELTON: First, let me say I applaud any efforts or any thought process that thinks about the cost of litigation and the amount in dispute.

Given all of that, however, you know, when you file a petition or a complaint with the Commission, the Commission becomes vested with jurisdiction over that, and it's only with the tribunal's permission can you amend that complaint. And the way I see what dPi is doing here is attempting to amend its complaint without your, your leave. I think you have discretion to decide whether Issue 2 should stay in or not. It's a different matter whether, if it, if you decide to remove Issue 2, whether that should be without prejudice or with prejudice. And, quite frankly, that's something that I had not thought about before walking in here and I'd like an opportunity to give a little bit of time to research that. To dismiss something with prejudice is, should not be taken lightly and I think there should be a very good reason before

doing so. And I'm not sure -- I don't understand enough about this case to know whether it's appropriate here.

COMMISSIONER McMURRIAN: So, Ms. Helton, it's one thing for the parties to agree to dismiss an issue with prejudice, but it's a different thing -- and I don't, and I didn't mean to suggest, and it was probably inartful wording on my part, I didn't mean to suggest that I felt like we were in a posture to decide whether to dismiss it ourselves with or without prejudice. I suppose I'm faced with a decision of whether or not to include Issue 2, but we would need to address with or without prejudice on that.

MS. HELTON: It sounds like the parties are in agreement that Issue 2 should not be included. AT&T only though, if it's not included so that, such that dPi can no longer bring that issue back before the Commission. Based on the exchange that I heard, I'm not sure that dPi agrees with that. And correct me if I'm wrong, please.

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

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

MR. CARVER: Okay. Then let me, let me say this. I want to clarify our position a little bit. Our position is it's part of the case and we're ready to go. You know, we've worked it up, we've filed testimony, we're ready to try it. And the case has been before the Commission for two years. DPi

has had the same opportunities we have. They could have sent out discovery pretty much any time during that entire two-year period, except for the brief portions when it was abated. They could have filed testimony the same as we did. They could have propounded discovery on it. So we feel that we're being disadvantaged because we're ready to go, we want to try the case, we want -- dPi wanted their day in court; we want to give it to them. But now after two years basically they want to take it out in a way such that the process would have to be started all over again. So I'm not saying we agree to their dismissing it regardless and it's just a question of, you know, legally whether it's with or without prejudice. Our position is we want to go forward with the case, we want to try the issue. And if they're going to dismiss it, then they should basically concede the issue and stipulate on that basis.

COMMISSIONER McMURRIAN: Mr. Malish.

MR. MALISH: I should point out that notwithstanding the fact this was filed in November 2005, for the vast majority of the two years that this case has been technically on file it has been abated while it's been moving forward in other jurisdictions. And so the, you know, the actual amount of time spent working on the issues here in Florida has been very much shorter than two years. So I think it's extremely disingenuous to suggest that we're not ready because of a lack of diligence on our part.

In any event, we can dismiss this case, this part of the case with prejudice, but that's different from what they're asking for. What they're really asking for is summary judgment or a summary decision in their favor on these issues. We can dismiss with prejudice, which just simply means we cannot make an affirmative claim for relief based on these issues; in other words, we can't sue them for this money, and we're fine with that. The problem that we have, of course, is if they choose to sue us for whatever this relatively small dollar amount is, we need to be able to say, huh-uh, you don't get that money, you're not entitled to it, and if you want to the litigate it, we're ready. But, again, we'd still have to do some discovery to figure out, you know, to present a full and accurate case.

As you probably know, the, the testimony to which Mr. Carver was referring, all of the original direct testimony in this case was filed before we had any discovery responses at all in any of the, to any of the questions or any of the issues that are involved in this case overall. So if we're going to litigate it, we need to have some time to see exactly where we're going to focus our defense on those particular issues. But like I said, we just don't feel like it's worth taxing ourselves or the Commission on something as small as that. We'd rather, we'd rather focus the attention on the big picture, you know, the lion's share of the dollars in dispute here, so.

COMMISSIONER McMURRIAN: Well, like Ms. Helton, I appreciate parties trying to make our job a little bit easier and I guess consolidate and focus on the issues that we really need to make decisions on. Having said that though, I noticed that you said that you believe what we really have before us is a motion for summary judgment. I disagree. I think that that's not something that's before us. It's definitely not something that I'm asked to do as prehearing officer.

But I believe that if either party wants to litigate Issue 2 at this point, that it should remain. From what Ms. Helton said, it seems like we have the petition filed before us, and that petition included some of these issues and that at this point that it seems fair to leave Issue 2 in and let each party take whatever position on Issue 2 they want. And that reminds me that in Issue 2 in the Prehearing Order I noted that your position was "No response," and I recognize in the OEP it states that essentially by the prehearing, prehearing conference that parties should take a position on issues. So what we can do is give you some time to amend that, if you would like. If you would like to amend it here today or if you would like some time to put forth a position on Issue 2 perhaps by the end of the day, we can do that.

MR. MALISH: As a matter of logistics, I think that's going to be practically impossible to amend it before the end of the day. We're basically committed to doing depositions as

soon as we walk out of this room through the end of the evening, at which point Mr. Bolinger and I will be going back to Texas and, and Mr. Watson will be going, who's just a witness anyway.

COMMISSIONER McMURRIAN: Well, we'll have a few days, sorry to interrupt, but we'll have a few days probably before, a day or two before we finish the Prehearing Order, so we could give you more time. But when do you think you could have a position on Issue 2? Or, I mean, if you want to leave it "No response," that's absolutely your option, but I'm just pointing out that it would probably behoove you --

MR. MALISH: I mean, I guess at this point our response could be we deny everything that they say, and then I have to come back and try to fill that in at the hearing. It's, it's an ugly way of trying to fix it, but it may be better than, than not fixing it at all.

I apologize for the, for the, for the difficulty. But, you know, short of moving the, short of moving the hearing and allowing us some time to conduct some additional discovery on these things that we're trying to set aside because they're not important, given, you know, the total dollar amount in dispute, you know, I don't have a position that I could give you right now or by the end of the day. And I don't know -- it may be that, you know, on Monday and Tuesday when I can direct my attention to this 100 percent I'll find out that I need to

talk to so and so or get such and such documents before I can have a meaningful response that will actually help the Commission to decide the issue, which is really what we're, really the purpose of discovery to begin with.

COMMISSIONER McMURRIAN: Mr. Malish, I mean, just on -- off the top of my head, I think Monday or Tuesday is a little bit late.

MR. MALISH: Well, the reason that I say Monday or Tuesday is because Thursday morning at 9:00 I have a trial that begins in Austin, Texas, that will go for two days, so I will be completely unavailable, frankly, Wednesday morning when I'm getting ready and Tuesday, excuse me, and Thursday and Friday when I'm in trial, and that's why as a practical matter it just won't be ready. I won't have the time, there are not enough hours in the day for me to, to do what needs to be done. And, and, you know, I apologize, but it is what it is. And I can't make it -- I can't change it at this point, at this point in the, you know, in life.

COMMISSIONER McMURRIAN: Do you have a recommendation on how much time we should give? I'm not sure exactly when we're shooting for the Prehearing Order to go out.

MS. HELTON: Let me let Ms. Tan speak to that. But I can't help but say something here. The Order Establishing Procedure in this case was issued on April the 13th of 2007. And if I recall, I think there's a section in there that talks

about that parties are expected to file positions on their issues and their prehearing statements, which are then incorporated into the Prehearing Order. And if you don't, then the effect of that, of not taking a position is that you've effectively waived your ability to raise or continue raising that issue throughout the proceeding. And so I am sympathetic in some ways to the counsel's problems with his time this week, but, you know, the Order Establishing Procedure was issued in the middle of April and we've had -- there's, you know, by my count there's several months in there where he could have come up with a position to his issue.

MR. MALISH: Well --

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

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

MS. HELTON: Staff is looking to bring to you the Prehearing Order the beginning of next week. All that said, I think that if they could provide you, have us an answer here Monday morning first thing that we could incorporate into the version that we bring to you for your signature, that seems to me to be reasonable.

COMMISSIONER McMURRIAN: Mr. Malish, can you do that? I mean, we'll set a deadline either way, but --

MR. MALISH: Right. I understand.

COMMISSIONER McMURRIAN: I think that that's probably more time than I had in mind, quite frankly.

MR. MALISH: Yeah. First thing in the morning for y'all is going to be earlier than, or earlier for us than it is for you because we're an hour behind. If you could make it noon on Monday, that would be easier for us to actually get you something.

MS. HELTON: Commissioner --

MR. MALISH: And I would, I would like to point out that -- I understand that there is an order and I understand that there was a procedural order, but that -- there are basically just problems inherent in the system the way that it is set up because we cannot narrow our issues until we've gone through the discovery process to find out, okay, is Issue Number 1 going to be 90 percent of what's at stake or is it only going to be 30 percent of what's at stake? And until we find that out through the discovery process, we cannot concentrate our resources on what it makes the most sense to concentrate our resources on.

Now, you know, that's just the way it is because of the way that y'all do business down here in Florida, and I understand that. And so if, if we had been able to know beforehand that, that, you know, this was a smaller amount than it actually ended up, than we were afraid that it might be, we could have done things differently. But it is what it is at this point. And if, if Monday at noon your time is fine, then we will try to have something back to y'all by Monday at noon

or 11:00 our time.

COMMISSIONER McMURRIAN: Frankly, Mr. Malish, and probably this is a good time to say this, I've been somewhat disturbed by some of the conduct in this case, and it's not about one party or the other. I would appreciate, to the extent we can going forward, and we're very late in the schedule of things at this point, that we all work together to get the info we need before the Commissioners so that we can make decisions on Issues 1 and 2. And I note what you've said about this; although it's a 2005 docket, it was in a period of abeyance for a long time.

That said, I think we've afforded a normal schedule in this case, like we do in a lot of our cases. And perhaps it's different in other states and maybe we have a smaller amount of time to get things done in. I don't know. But that said, it seems to work in most of our cases that we're able to get the discovery done and get positions and, frankly, don't usually spend this much time in a prehearing conference on just trying to get positions in the Prehearing Order, quite frankly. So if you need any procedural assistance or need advice on how we do things in Florida, I suggest that maybe you avail yourself of the General Counsel. They're really good in other procedures and can help you out. And I'd venture a guess that's there's already been a lot of discussion between the parties in this case with Ms. Tan several times, and I think

you have found her to be helpful, and I suggest that we continue to do that.

That said, I think that noon on Monday is pushing it. I was frankly thinking more like Thursday of this week. But I think Monday 8:00 a.m. seems reasonable because we do want to get the Prehearing Order out in time. And I would suggest too that in order to focus your attention on the hearing which is early next week, that perhaps we need to get the position statement out of the way and focus on cross. Or not early next week, early the next week. But that we need to have a Prehearing Order for the parties to sort of, to follow to get ready for conducting the case that week, and I think Monday morning should be sufficient to develop a position on Issue 2.

MR. MALISH: Commissioner, if you will allow Mr. Bolinger to file on his own instead of through me, because he's not really admitted pro hoc vice in this case, he can do it by Thursday. I don't know.

MS. HELTON: I don't think we're that formal as to where we require filing. I think a simple e-mail to Ms. Tan would work beautifully.

COMMISSIONER McMURRIAN: That's sufficient for me. Does that work for you?

MR. MALISH: Okay.

COMMISSIONER McMURRIAN: Thank you.

So where are we? I guess that leads us to

Section IX, the exhibit list? Is that correct?

MS. TAN: That is correct, IX.

COMMISSIONER McMURRIAN: Thank you, Ms. Tan. Which is on Page 7. Are there any changes to this section? Go ahead, Ms. Tan. I think you wanted to point out something about the exhibit list.

MS. TAN: There are no changes, but staff would like to note for the record that we will prepare a comprehensive exhibit list consisting of all prefiled exhibits for the purposes of numbering and identifying the exhibits at hearing. Staff will provide the exhibit list to parties as soon as possible.

Staff also intends to prepare a proposed stipulated exhibit composed of certain discovery responses and deposition transcripts, which it will provide to the parties in advance of the hearing.

COMMISSIONER McMURRIAN: Are there any questions or concerns about that?

MR. MALISH: None from dPi.

COMMISSIONER McMURRIAN: Okay. Ms. Tan, you might have said, but approximately when might the parties receive that just in case they need that information?

MS. TAN: We most likely will be sending it by the end of the day. If not, no later than tomorrow.

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

include depositions, did you say, also? I may have misunderstood you.

COMMISSIONER McMURRIAN: I think it might.

MS. TAN: Staff typically likes to put the deposition transcripts -- obviously, given what's been occurring, we may not put that in at this time. When I circulate the proposed list, you can let me know at that time whether or not we'll have an issue with it and, if necessary, we can take it out and deal with it at the hearing.

COMMISSIONER McMURRIAN: So, Ms. Tan, when you circulate, will you include some kind of deadline in the e-mail for the parties to get back to you if they have any objections to any of the included exhibits?

MS. TAN: Certainly.

COMMISSIONER McMURRIAN: Is everyone on the same page?

MR. CARVER: Yes. Thank you.

COMMISSIONER McMURRIAN: Section X, proposed stipulations. I suppose we have none.

Section XI, pending motions. We have several. Ms. Tan, did you want to --

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

COMMISSIONER McMURRIAN: -- go through them one by one maybe?

MS. TAN: Okay.

COMMISSIONER McMURRIAN: And I'll add in as necessary.

MS. TAN: The first one that we received was dPi filed a motion for leave to file amended testimony on July 23rd, 2007.

COMMISSIONER McMURRIAN: There were no objections filed to this motion; correct?

MS. TAN: None at all.

COMMISSIONER McMURRIAN: I'll show the motion granted.

MR. CARVER: I'm sorry. I did have a concern I would like to raise about their amended testimony.

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

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

COMMISSIONER McMURRIAN: I'll show that motion granted. We'll get to the other one, Mr. Carver.

MR. CARVER: Thank you.

MS. TAN: There was also -- AT&T filed a motion to strike, which an e-mail ruling, I mean, an order is pending, but I just wanted to note that an order is pending on that.

On -- hold on one second. And there was a response in opposition filed by AT&T to -- sorry. DPi filed a motion to

compel for provision of information requested in dPi's request for information 1 through 19 on September 13th, and AT&T filed a response in opposition to dPi's motion to compel, which was filed on December 17th.

COMMISSIONER McMURRIAN: September 17th.

MS. TAN: Yes.

COMMISSIONER McMURRIAN: Okay. Let me first ask both parties whether you all have been able to work something out to get the information needed.

MR. MALISH: I hope I'm not speaking out of class, but I think where we left things right before lunch, Mr. Carver and I, is that he would withdraw his objections to our amended or late-filed testimony if he were given an opportunity to amend his, I guess, rebuttal testimony. It doesn't matter to us which testimony he amends. If he's allowed to do that by -- did you say Thursday? And I don't know if you meant Thursday of this week or next week.

MR. CARVER: Maybe I'm confused again. I thought we were talking about a motion to compel.

COMMISSIONER McMURRIAN: We are.

MR. CARVER: Okay.

COMMISSIONER McMURRIAN: And I'm sorry for the confusion.

MR. CARVER: I'm sorry.

COMMISSIONER McMURRIAN: I think we're talking about

your motion to compel now, and AT&T filed a response to that earlier this week, perhaps yesterday.

MR. MALISH: We're still at an impasse about that. The only thing that we've been able to agree to is the thing that I mentioned earlier about the testimony.

COMMISSIONER McMURRIAN: Okay.

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

MR. CARVER: Well --

COMMISSIONER McMURRIAN: We'll take that up in a second, but I'm glad to hear it.

But with respect to the motion to compel, is that your understanding too, that you all haven't been able to work anything out on the information that dPi seeks?

MR. CARVER: That's correct. We discussed it a couple of hours ago and tried, but we have not been able to work that out.

COMMISSIONER McMURRIAN: Do you think that you're going to be able to work something out so that if I give you perhaps to the end of the day, maybe at the end of the depositions if you all -- to try it again or -- I'm seeing nos. Mr. Carver?

MR. CARVER: I don't think so. I mean, frankly, we're at a point where what, and I don't mean to preargue here, but what dPi has asked for is something that's impossible to do

before the hearing, and we've tried to tell them what we can do. I mean, we have objections to it. We don't think it's relevant. But we've tried to do as much as we can and they've told us that's not acceptable. So I don't --

COMMISSIONER McMURRIAN: So let's do it this way then, and I hate to interrupt again. Mr. Malish, if you'll summarize your motion to compel, then I'll allow AT&T an opportunity to summarize their response, and about five minutes each I think should be sufficient. And then we'll get a recommendation from staff, and then I'll decide whether or not to take it under advisement and look at it more closely and then rule later, perhaps by the Prehearing Order, or whether I'll rule on it today, but probably the former.

So, Mr. Malish, if you'd like to take five minutes and argue the motion to compel.

MR. MALISH: Thank you, Your Honor. I'm sorry. I guess it's Commissioner, not Your Honor. I don't know. Maybe it's Your Honor. I always get tripped up by that, so I apologize.

COMMISSIONER McMURRIAN: Commissioner is fine.

MR. MALISH: The outstanding discovery dispute that we have hones in on what turned out to be the cornerstone or the linchpin of BellSouth's case or at least the decision of the North Carolina Commission in the North Carolina proceedings. And the, the contention there and in Florida as

well by BellSouth is that we do not have to make this line connection charge waiver available to dPi's end users because we don't make it available to our own. And that is a conclusory statement and it is made -- it was made entirely based on the hearsay testimony of Pam Tipton in North Carolina but, nevertheless, became the cornerstone of the, excuse me, the decision there. And it's necessary for us to be able to test that to see if that's actually true.

So, first of all, we need to be able to see do they have end users that subscribe to service in this particular way, and, if so, what do they actually charge them? Because that is what drives -- that would -- you know, if, number one, they haven't had anybody sign up for it the way that we sign up for it, then they've just made something up. Number two, if they have signed people up for it and they gave them the line connection charge, then we are definitely entitled to it. That would be like basically the smoking gun for us, frankly. And we've asked to see this information from a specific period of time. We'd like to see it in calendar year 2004 and calendar year 2003. Those are the most important times for us.

And the reason why those are the most important times is because when this was first -- before this actually became a dispute and these promotion credits were being applied for, they were actually being paid. They were being paid to other CLECs. And at a certain point in time BellSouth basically

changed its position and stopped paying them and has now said, well, if we paid them before, it's because we were cheated or fleeced or defrauded or whatever. And they would like to, if they can, show us what they've been charging their customers for these sorts of services or these combinations of services lately. But the thing that would be most helpful for us and for the Commission to see is what the pattern and practice was before this became a contested issue, and that's when we want to see this evidence. And it exists, but they have a hard time getting it.

Now we've asked for it in, in all of the BellSouth states basically going back to whenever we've filed discovery in any one of these cases that we have and they're in every one of the jurisdictions, and we've never seen a single order, not one that shows the actual order and what was charged for that.

Basically what they're hanging their, their case on is the testimony of one person who's under any circumstance, I guess, besides, you know, except in certain -- in any court of law that testimony which they're using as the cornerstone of their case is not admissible because it's hearsay. And so we have to -- this is the only way we have to challenge it, this is the only way we have to look at it. And if they're going to say that we are, we get a free pass on this because we don't do it that way, they ought to be able to show it to us. The documentation or the electronic data exists, they just have to

go and collect it and show it to us.

If they can't get it ready, I don't have, I don't have -- that's not my fault and it's not my problem. If there is a need to postpone or something like that so they can find it, I can understand that. But to say that we just can't, we shouldn't have to provide it and we should be allowed to testify about it anyway when we go to hearing, that's something that can't possibly be acceptable under any traditional notions of fair play and justice. So it's a piece of critical discovery that we're asking for because it goes to the heart of the case, and to allow them to just make the contention without having that investigated is totally improper.

COMMISSIONER McMURRIAN: Thank you, Mr. Malish. And just one clarification point. You mentioned the calendar years 2003 and 2004. From memory, and I need to look back at it, but did your request also include as far back as 2002 and you're not --

MR. MALISH: It did. If we're trying to make it easier for them to find it, I can, I can limit it to 2004 and 2003. The farther back in time we go apparently the harder it is for them to find something.

We applied, dPi applied for the promotion in August of 2004 to cover -- well, it initially applied for it in August of 2004, but based on service that had been rendered throughout 2004 and into, back into 2003. So that's why those are the

relevant time frames. And also it should be noted that in January, February, March, April of 2004, that's when BellSouth was paying this promotion to other entities, at least ones that we know about. And they may have been paying it to other entities that we don't know about or at different points in time, but, you know, this is where we know there has to be some, a period which there has to be some information out there, and it's the most useful to us. Because after they changed their policy on whether they're going to pay these or not, you know, and then they provide orders after they've, you know, they've done an analysis and said that we're just not going to pay these anymore, that doesn't help. We need to see what was going on before they took a position, before there was a dispute.

COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

Mr. Carver.

MR. CARVER: Thank you. We believe that dPi's motion should be denied for three reasons: One, the information they've requested is irrelevant; two, responding would be tremendously burdensome; and, three, dPi has made this request so late that it would be impossible to respond to it. I mean, it's simply not possible before hearing. And I'll get to that a bit later in my presentation, but I will explain that.

The irrelevance issue, I know typically discovery is a very broad net, so I'm only going to touch on that very

briefly and move on, but I do think it's an important note. What they're asking for is what we do with our customers when a customer orders a block. In other words, when the customer orders a block, does it qualify them for the line connection waiver charge? Our belief, and we're trying to develop this through the depositions we're taking today, is that dPi customers did not order any blocks. Instead, what happens is when a dPi customer signs up, dPi places blocks on their customers' lines. They place them there without the customer's knowledge, without the customer's consent. They don't charge the customer for it, but then they use that as the basis to try to generate the promotional discounts. And then if they get the promotional discount, they keep the money. They don't pass it on to the customer. We believe that that is a fundamentally different situation than the situation we have with our end users because we don't put things on our end users' lines that they don't order. So to go and say they want to see what our end users have ordered, it's not exactly relevant.

Now I will admit that there are some other theories in the case and under those theories is might be relevant. So what we did is rather than -- I think it's important to make the point that it's not really relevant, but I'm not standing on that alone. We did go and we have tried to respond to this as best we can, but here's the problem. The request that dPi has made, and they say that they've made this -- that we

haven't produced any orders.

Well, the reality is is that what's happened in every state they request us to give them every order of every one of our customers who've ordered blocks for a five-year period. In the State of Florida we have millions of residential customers. To look through millions of orders for a five-year period is something that is simply insurmountable, so we objected. We objected five weeks ago. DPi waited three weeks before they came to us and suggested that they would take anything less than that. There was a period of about three or four days of negotiation, and we reached the point where we said, okay, we'll try to look and we'll try to see if we can find this, if it's even possible.

And we have programmers and IT professionals who have been working, it's my understanding, virtually around the clock to find out if there's any way to do this, if there's any way to look through millions and millions of orders to determine which of those customers ordered blocking, ordered two blocks and ordered nothing else, and it is a monumental task. It's virtually impossible to do this because they have to come up with a program to go into the system, and it takes time just to develop the program, much less to run the program and to get the responses.

And what we found as a result of this and what we've offered to dPi is that we can give them a spreadsheet that

would show them what our residential customers -- well, first of all, it would identify the residential customers who've ordered two or more blocks and it would tell them whether or not they received the promotional credit for the time period from September 2005 through August 2007. I mean, our people at this point will literally have to work night and day, but I think they can come up with that two years.

The difficulty is that we would pull this from a particular billing system which only keeps the records for two years. After it drops off the system, in order for the information to be extracted, our programmers have to go into another database. And, frankly, what's happened is because dPi has delayed this request for such a long time, we're working to try to see what we can do, but even the information of how it would be done and the information about how it could be done is something that we're sort of struggling to get our hands on. But it appears that once the information drops off the primary database, they would then have to go into backup databases and extract the information from customers manually one account at a time for millions and millions of customers. It simply can't be done.

So we have ordered them -- we have offered them the two years. We have offered them this even though they waited until ten days ago to even move off of their request that we look through ten million records. And when I say ten million,

I'm looking at the customer base multiplied by five years. Even though they did that, we've been working. But this is, this is the best we can do in the short time frame.

Now one other thing I want to add, counsel for dPi says that he needs two years before, and he really doesn't. Because this notion that BellSouth somehow in bad faith simply decided that they weren't going to pay orders, there is absolutely no evidence in this case whatsoever to suggest that. Mr. Bolinger says that in his testimony, but they have provided absolutely nothing. But based on that and with nothing more they want us to basically plow through, again, you know, millions of customer records. It's tremendously burdensome. And we've tried our best, even though I don't think we should have to do this, but we've tried our best and two years is all we can do in the time that we have. And under the circumstances, under the fact that they waited until very recently to propound the discovery, based on the fact that they waited three weeks after we objected before they even tried to start the process, I think this is going above and beyond. But, again, it's the best we can do.

COMMISSIONER McMURRIAN: And one clarification for you too, Mr. Carver. Is it -- and I understand what you said about going to another backup database, but is it harder to get the information for 2003 and 2004 than it is to get it for 2005 through 2007?

MR. CARVER: It's virtually impossible because here's what happens. There's a database that's used -- and, again, the problem I'm having here is that dPi requested this so recently that our people have just started looking into it. And what I'm telling you is my best belief about the way the process works, but this has literally all come up within the last few days. So, you know, I hope that I can say this with a qualification that it's my understanding.

The last two years, that's a database that is used by customer service representatives and other people in customer services and I think they could run a program to extract the information from that. But what happens is it ages out. Because, I mean, when you have customer service records for millions of customers, it's an obvious drain on the memory of the system. So it ages out and it drops off that system. Then to the extent that there's any need to go back and look at the customer records, there's a process, and I'll have to admit I can't explain it completely. But as I understand it, the programmers then have to go into a backup system and try to in effect manually recreate the database that exists for the two most recent years. And we've had to do this in response to another request by dPi on, I believe it was Number 18. They wanted to know how customers that they've sent to us were handled on a, you know, on an account-by-account basis, and this came up in South Carolina, it came up in Louisiana. And

it takes something like, you know, six weeks to pull six months of data even on their limited customer base. In terms of how long it would take to pull this information for our customers for years where it's already dropped off the system, I think it's virtually impossible. Now I know with time and money anything can be done, but I, I don't think that there's any way it could be done prior to the hearing.

And, again, the only reason it's relevant is because of this theory that dPi has that there is absolutely no support for, and I would submit that that really shouldn't be used as the basis for, to use the cliche, a fishing expedition that would cause us to have to do something that would take hundreds, perhaps thousands of hours, and maybe couldn't be done at all.

COMMISSIONER McMURRIAN: Staff, are you prepared to give a recommendation at this time or would you like to take it under advisement as well?

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

MR. MALISH: Do I have an opportunity to rebut any of his -- I mean, it's my motion. I would imagine I have a burden of proof here.

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

COMMISSIONER McMURRIAN: That was, that was my

initial reaction as well, Mr. Malish.

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

MS. TAN: The next motion is that on September 14th dPi filed a motion for leave to file amended testimony.

COMMISSIONER McMURRIAN: Okay. And I believe, Mr. Malish, you had some information for me on this motion.

MR. MALISH: There are actually probably a series of motions all connected with testimony probably from both sides. And I may have misstated. My understanding of what I thought was an agreed solution to this issue would be to let -- it was brought up by Mr. Carver and he said, you know, if I can amend mine on Thursday, and I don't know if he meant this Thursday or next Thursday, then I don't have a problem with yours. And we don't have a problem whether it's this Thursday or next Thursday. And if that -- I'll have to let Mr. Carver affirm or deny that that is the agreement. But if that is the aagreement, we're happy to make that agreement, and that way the, the Commission is, you know, has the benefit of as many of the facts as we can get out on paper before the, before the, before the hearing and we don't spend time fighting over what facts are going to be allowed in and which aren't. We'll just be as broad as we can be.

COMMISSIONER McMURRIAN: So if they're given the opportunity to amend their -- well, perhaps I should just let Mr. Carver explain, because I do need to understand whether

it's direct and rebuttal or just rebuttal.

MR. CARVER: There's a little more to it than that, and let me try to explain.

First of all, one objection that I had to their motion is that they don't identify the changes. So basically I'm put in the position of having to take the amended testimony that they've filed and compare it to the previous one and try to find all the changes. And what I asked Mr. Malish to do earlier today is just to red line a copy and show me what they changed so that I can be clear that I'm not missing something, and I haven't received that. If I can get that and take a look at it, you know, if I can get it by the end of the day, I think I can agree to the rebuttal testimony. I don't have a problem with their amending their rebuttal testimony because it's what they said they were going to amend in their prior testimony. I filed a motion to strike, it was denied, so that's settled, and I don't have a problem with that. Again, if I can see a red line to find out what they've changed to make sure there's nothing objectionable that I've missed.

The thing I have a problem with is they've also amended their direct testimony. And in the communications that I saw about this issue, I thought it was contemplated that they would only amend their rebuttal. What they've done is they've gone back and they've amended their direct and they've amended it on an issue that has nothing to do with what they, what they

brought up in their rebuttal testimony originally. Excuse me. Sorry.

In the original rebuttal testimony they just said that they didn't know the amount in controversy and they wanted to amend and they did, and that's fine. What they've done now is they've come back in their direct testimony and they've attached as an exhibit to Mr. Bolinger's testimony something like, you know, 30 or 40 pages of e-mails that I haven't seen before and it's in the direct testimony. If they file direct testimony now, then we're deprived of the opportunity to respond. So technically I don't think they should be allowed to do it. But what I said in an effort to be cooperative is I'll agree to it if I can have a chance to look at it and to file some sort of rebuttal testimony. And, you know, there's an exhibit. It, you know, it's going to take a while. So what I was suggesting was that they agree to next Thursday, which would be about two or three days before the hearing begins. I mean, if we can have that amount of time to review what they did and file rebuttal, that's fine. If not, I would object to their amending their direct testimony.

COMMISSIONER McMURRIAN: So would, Mr. Carver, would your rebuttal testimony be limited to rebutting the new information that's added in the exhibits of the direct testimony of dPi?

MR. CARVER: Yes, it would be. And there may not

even be any. I mean, after review we might look at it and decide there's no need to file testimony. But to the extent we did, it would be limited to whatever they changed in the direct. But, again, I would like for them to tell us what they changed.

MR. MALISH: It sounds like I accurately summarized the agreement, which is that he'll have next Thursday to amend, and we're fine with that. And I'll get him a copy insofar as I can of a, of a comparison red line. I asked my staff to try to do whatever, you know, track changes kind of -- whatever the word processing thing is that shows the old compared to the new, and I should be able to e-mail that to him so it's actually in red as opposed to a fax where it's all black. So, so basically it's up to you. If you will agree to our agreement, then it can be done.

COMMISSIONER McMURRIAN: It sounds like we have an agreement. But as far as the timing, do you have any thoughts on -- and is it next Thursday we're talking about any rebuttal testimony would be due from, any revised rebuttal would be due from you?

MR. MALISH: Yes.

COMMISSIONER McMURRIAN: Or would it be supplemental rebuttal?

MR. CARVER: My guess, supplemental or amended rebuttal. But I think, yes, nine days is what we're asking

for.

MR. MALISH: I would prefer to call it amended rebuttal so we can throw the old one out and just have the new one.

MR. CARVER: Well, except we may not, we may not -- we're not going to refile our entire rebuttal testimony. I mean, what I'm really proposing is we just look at what they filed. And if it merits a response, then we'll just have something that's maybe as little as a page or two and then we'll go ahead and that will be a supplement. I think it's better to do it that way than to have us try to, you know, redo our testimony and work it in somewhere.

MR. MALISH: Well, that's fine then. That's fine.

MS. TAN: Commissioner, you have the discretion to set the date for that. However, we would recommend that next Thursday would be too long and that probably it would need to be on Tuesday the 25th, no later than the 26th.

COMMISSIONER McMURRIAN: And if there were revised rebuttal testimony somehow, would there possibly be a need to do any discovery on it and would we have time to get that in?

MS. TAN: We would not have time to do that.

COMMISSIONER McMURRIAN: But if that's part of your agreement and that's the understanding, then that's, of course, fine with me. But if -- I'm just trying to foresee any problems coming up if we do have any revisions filed. And,

Mr. Malish, I look to you because it would be --

MR. MALISH: Yeah. To be honest with you, what's in the amended -- when we filed the original testimony there was things like, we don't really know what the situation is in Florida, but if it's anything like it was in North Carolina, then blah, blah, blah, blah, blah. And so we fixed it to say now we know what it really is in Florida and here is what it is.

The, the, the e-mail exhibits that Mr. Carver was referring to are taken from the North Carolina case because it's some correspondence that was going back and forth between the parties. And Mr. Carver's predecessor in interest, Andrew Shore, would have been -- you know, he's seen it and been through it all and it was exhibits in the other case. And the only reason that Mr. Carver may not be already familiar with it is just because he had to take on this job from somebody else who was lead counsel managing -- I believe Mr. Carver manages the litigation in all the, in all the states like Mr. Shore did before. So he may, Mr. Carver may not have seen it, but it's something that's been in the case. When I say the case, I'm talking about sector-wide. I can't imagine there being a need for any more discovery.

COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

Mr. Carver, on the date.

MR. CARVER: I'd just request that Mr. Malish get his

red line to me electronically within 24 hours. I've confirmed with my witness if he can do that, then we can file by next Tuesday.

COMMISSIONER McMURRIAN: Mr. Malish, and I'm not sure if it has to be, you know, type and strike or if it could just be a copy that highlighted where the changes were.

MR. MALISH: Yeah, one way or the other. But I, you know, I'd just like -- you know, the Word Perfect or Microsoft Word program does it for you, you know.

COMMISSIONER McMURRIAN: Right.

MR. MALISH: Yeah.

COMMISSIONER McMURRIAN: Could you do that within 24 hours?

MR. MALISH: That's what I'm trying to do. My staff is supposedly doing that already, but I haven't seen the final work product yet.

COMMISSIONER McMURRIAN: Ms. Tan, any concerns?

MS. TAN: That would be fine with staff.

COMMISSIONER McMURRIAN: And Tuesday, Mr. Carver, you can do that by Tuesday?

MR. CARVER: Yes, ma'am, we can.

COMMISSIONER McMURRIAN: Okay. So, Ms. Tan, do we, do we give that some time and just make sure that all those things are taken care of or can we render some of these -- render the motion for leave to file amended testimony moot or

do we just --

MS. TAN: I think that we can render it moot considering that they have an agreement. I would like to ask that if you are able to send a copy of the red line, if you're doing it electronically, if you can give staff a copy also so that we're aware of all the changes that were made in the rebuttal that -- all the testimony that was submitted.

MR. MALISH: We would be happy to do so.

MS. TAN: Thank you.

COMMISSIONER McMURRIAN: Okay. I think that leads us to AT&T's motion to compel that was filed yesterday.

MS. TAN: Right. And there were two filings that were done yesterday: One was a motion to compel and one was the motion to strike testimony of Pam Tipton by dPi. And what we would recommend is that it's in your discretion to request an expedited response time. And given that we are verging very close to the hearing date, we would like, we would recommend that you would do an expedited response time so that we're adequately able to move on these issues.

COMMISSIONER McMURRIAN: Are you recommending a certain deadline?

MS. TAN: Thursday would be good. No later than Thursday.

MR. CARVER: On the response to the motion to strike, I'd like to have an extra day, if I could. This is a

significant motion. Basically dPi is moving to strike every bit of testimony that we filed in the case. I'm going to be here on depositions through the remainder of the day and perhaps into the evening. I'll be driving back to Atlanta tomorrow, so I can't really start working on it until Thursday. And given the fact that it is a motion to strike all of our testimony, I'd like to have a little bit of time to do some research so that I can file something that's an adequate response. And I don't think that there's any pressing need to get it resolved immediately.

A lot of these discovery disputes are the sort of thing where, where your ruling would then prompt some other step and someone would have to respond or answer something. But the motion to strike, I think as long as it's sorted out, you know, by the time Ms. Tipton would take the stand on October 1st I think is adequate. So in this circumstance, I understand why staff wants expedited treatment, but I would really like to have as much time as you can possibly give me because, again, I think it's a very significant motion and it deserves a substantive response.

MS. TAN: I think that staff could probably do Monday. But if you could get it in by noon on Monday, that would be appreciated.

MR. CARVER: This next Monday?

MS. TAN: Yes.

MR. CARVER: Okay. That would be fine.

COMMISSIONER McMURRIAN: Well, you were asking for Friday.

MR. CARVER: I was asking for Friday, but Monday would be wonderful.

COMMISSIONER McMURRIAN: Ms. Tan --

MS. TAN: Oh, I missed --

MR. CARVER: If I could have the weekend, even better. I thought my argument was that compelling.

(Laughter.)

COMMISSIONER McMURRIAN: I want to give both of you the same amount of time and realize that dPi's response on the motion to compel might be fairly lengthy as well because I see that it is in response to several interrogatories and requests for admission. So, Mr. Malish, I want to ask you, how much time do you think you need? Could you get something by Friday or --

MR. MALISH: This Friday?

COMMISSIONER McMURRIAN: Would you like Monday as well?

MR. MALISH: Well, I would have to have Monday. But, you know, I might be prepared to do this orally. If you can do it orally without a written submission from us, I could do it orally now. That's --

COMMISSIONER McMURRIAN: We could, we could take oral

argument on it and then I could take it under advisement. Because I just, I haven't had the opportunity yet to look at the motion to compel, so I wouldn't be able to give you a ruling now. But if you would like to give your oral response -- Mr. Carver, are you prepared to give a brief summary of your motion to compel now?

MR. CARVER: I hadn't planned to do that today, but I can, I can brief in the motion and do my best.

COMMISSIONER McMURRIAN: I mean, Mr. Malish, if you're okay with AT&T having a filed motion and then you doing an oral response, and then, if you, I guess if you wanted to follow with, if you wanted to follow up later with something on paper and we gave you a certain deadline and then you could if you got time to and then if not -- I just hate -- I just want you to know that if you're waiving that right to file something in response and would just make your arguments orally today, that you understand that and you're okay with that.

MR. MALISH: I'm okay with that.

MR. CARVER: Well, if I may, I would like to summarize my motion then. I understand you said you hadn't read it, so I'd like to at least express --

COMMISSIONER McMURRIAN: Oh, absolutely. I wouldn't make a ruling today anyway.

MR. CARVER: Okay.

COMMISSIONER McMURRIAN: But what I'm saying is you

filed something on paper. And as I understand Mr. Malish, he would prefer just making his response orally today and so I have one filing that I can review later, but all I would have for Mr. Malish would be the statements he makes here today. I just want to make sure he understood that.

MR. CARVER: Okay.

COMMISSIONER McMURRIAN: But if you both are okay with that, then I'll take oral argument, I guess five minutes each. Is that -- Ms. Helton or Ms. Tan? And then we'll take it under advisement and we'll issue a ruling later, perhaps in the Prehearing Order.

Mr. Carver.

MR. CARVER: Thank you. Actually, despite all the activity in this case, what it boils down to is, from a legal standpoint is something really pretty simple. There's an interconnection agreement between the parties which says that if a dPi end user ordered something that would qualify them for a promotional discount if they were a BellSouth user, then they get the promotional discount.

In this particular case what we're arguing about is the line connection charge waiver, and that waiver says that the line connection charge is waived when a customer orders a variety of things or possibility, but the one that's really relevant is when the customer orders service, basic local service and two features.

Now our position is that dPi can't prevail for three reasons. One is because what they have submitted are not features, they're blocks of features. In other words, they haven't submitted Call Return or Call Waiting, they've submitted blocks of those things.

The second reason we believe they can't compel -- they can't prevail is because the tariff requires that there be two purchased features. And what they have submitted again are blocks that are available at no charge so there is no purchase.

The third reason we think they can't prevail, and this is what the discovery really goes to is this third reason, is because what we believe, in fact, what we know because they've admitted this on the record in North Carolina after they were compelled to answer the questions, is that when a dPi customer signs up for basic service, the dPi customer has added to their lines without their knowledge or their consent blocks. In other words, they want basic local service and dPi blocks their ability to order anything. They don't tell the customer they've done that, they don't get the customer's consent, they don't tell the customer after the fact, but that's what they do. They don't charge the customer anything for the block and they don't pay BellSouth anything for the block. And if they get the promotional credit, then they keep their credit. They don't give it back to the customer.

Our belief is that those circumstances are so

fundamentally different than what our customers order that they can't possibly be considered comparable. Those facts that I've just recited, the ones that we know to be the case because they were, they came out during North Carolina, we have tried to establish those through discovery in this case. And every single request for admission, every single interrogatory that's at issue here goes to one of those elements. It's the heart of our case.

Again, we think there are three reasons why they can't prevail, but this is one that's very important and is very central. And what we're simply trying to do is establish what their actions were. Because the only way you can really judge whether they qualify under the promotion and whether we have a contractual obligation to give them a credit is to determine things like whether their customer actually ordered anything, whether their customer purchased anything, whether the customer had something added without their knowledge, and also whether the blocks are features. So what we've done is we've tried to establish these same facts that went into evidence in North Carolina because we believe that that's the only way that you can get a full picture of their actions and that's the only way that, that you can see what really happens so that you can make a determination.

So we sent 20 requests for admission to dPi and we sent about 35 interrogatories, 40 interrogatories. I don't

remember the precise number. A lot of the interrogatories simply tracked the request for admissions. We said, you know, if you, if you object -- well, I'm sorry. If you deny the request for admissions, then tell us why. So we have nine requests for admissions, we have nine interrogatories that are asking for follow-up to those, and then we have a handful of other interrogatories, but every single one of them relate to one of these things that I've just talked about. And I'm going to just read them from the motion to give you a more specific example.

Request for admissions Number 9 and 11, we request dPi to admit that they placed blocks on all customer lines and the customers did not request the blocks, and I'm reading from Page 4 of the motion. We asked them to admit if dPi did place blocks without a customer request, we asked them to admit that they didn't obtain the customer's consent or inform the customer. Request Numbers 13, 14, 15, and 17 are just more specific requests. Like, for example, we say if the customer orders Call Return, then do you not block Call Return? If a customer orders Call Waiting, do you vary from your usual process and not order Call Waiting? We asked them if customers are allowed to order, you know, Touchstar features or, in other words, what we define as Touchstar features. So do they, can they order them or do they just block every customer every time? So we believe it's relevant.

I believe it's relevant for another reason too and this is something that is important. This is specifically addressed in their testimony. If you look at the amended testimony of Mr. Bolinger, on Page 3, Footnote 1, he describes their service offerings. And the way he describes it is he says that dPi presents to their customers a service offering compared -- I'm sorry -- comprised of the basic local service and two features or two blocks. So I think inasmuch as that's in his testimony -- I think I should be entitled to ask this under any circumstances. But given the fact that he has specifically addressed this in his testimony, that he talks about their service offerings, I think I'm certainly entitled to follow up and inquire about it. He also says in that same footnote that customers are allowed to order other features, and that's what the other discovery goes to.

And, finally, the last piece of it is I've asked -- pardon me. I've asked whether the discounts are passed on to the customers because in another portion of his testimony, in Page 2 or 3, he goes through this rather elaborate scenario whereby he concludes that we're trying to harm their end users. So if he says that their end users are going to be harmed by our not giving them the credits, then I think it's certainly legitimate to ask whether they passed the credits on.

So, again, this is the heart of our case, this is something that's specifically raised in their testimony, and

it's something that we believe is relevant by any standard. Thank you.

COMMISSIONER McMURRIAN: Thank you, Mr. Carver.

Mr. Malish.

MR. MALISH: Hi, Commissioner. Thank you.

Generally speaking, we have objected to everything that they've asked about that goes to what we charge our customers for the service they get from us, and that's entirely appropriate because that's completely irrelevant to the issues that are teed up in this case.

The issues in this case are simply what does BellSouth charge its end users and what service does BellSouth provide its end users? Because whatever it provides to its end users dPi can get. End of story. So, for example, if, if BellSouth provides the LCCW to certain customers in a certain way at retail, we're entitled to get that at wholesale, and it simply doesn't matter whether we pass those on or don't pass those on, whether we give them a bigger discount or less of a discount or no discount at all. What goes on between dPi and its end users frankly has nothing to do with the price and the service that -- or legally anyways, it's not legally relevant to what price dPi is entitled to get when it purchases things at wholesale from BellSouth.

And so this list of, I didn't add it up, but, you know, it's a whole line of numbers, I mean, you know, 20 or 30

things they have requested all goes to what do you do with your customers, what does dPi do with its customers? And, frankly, that's just completely irrelevant. And because it's completely irrelevant it won't help in any way decide the question of what BellSouth provides its end users at retail and, therefore, what we are allowed to purchase at a wholesale discount, we shouldn't have to answer that at all. Under Florida Rule of Civil Procedure 1.280 we would be entitled to a protective order under subpart, I guess this is (g). It's blacked out on mine. I'm having a hard time reading it. But it's under protective orders.

"In order to protect a party or a person from annoyance, embarrassment, oppression or undue unburden or expense, the tribunal may decide that certain matters not be inquired into or that the scope of the discovery be limited to certain matters." So what we have here is this huge red herring. As you can see, you know, it's not just one or two or three questions, it's 20 or 30 questions, all requiring us to dig up and share information on something that's completely irrelevant and can never be relevant to Issue Number 1 that has to be decided by the Commission in this case. It doesn't matter what we charge at the end of the day to our end users. I mean, by logical extension what they seem to be saying is anything that you get from SBC or, excuse me, BellSouth, now AT&T, you have to pass that on to your customer. So,

therefore, if you buy something at resale, regular garden variety, ordinary service at resale, whatever the -- what is the discount rate here, probably 21 percent -- you have to pass that along to your end user. And, of course, that's not true. The price that dPi pays at wholesale is, as a legal matter, completely unlinked from what they charge their customers, what dPi charges its customers at retail. It simply doesn't matter. And so there's no point going down this rabbit trail of answering all these questions for something that just doesn't matter at the end of the day. I mean, the whole purpose of this, I would suppose, would be to say, look at these promotions they're taking advantage of, if this is true, if this is how it actually plays out, look at all these promotions they're taking advantage of, they're getting a discount on this promotion but they're not extending it to their own end user. Just like will they get a discount by buying at wholesale but they're not giving that to their end user. Well, that's the arbitrage. I mean, that's what the whole reseller system is based on.

COMMISSIONER McMURRIAN: Thank you, Mr. Malish.

MR. CARVER: Commissioner, I won't ask to respond, but I do want to make one clarification because I think I misstated something about the testimony.

COMMISSIONER McMURRIAN: Oh, so you want to correct something you stated earlier?

MR. CARVER: Yes. Yes.

COMMISSIONER McMURRIAN: Okay.

MR. CARVER: Okay. I was telling you about the portions of Mr. Bolinger's testimony that refers to this specifically, and it's his first amended testimony Page 3, Footnote 1. That's where he describes the dPi offerings.

COMMISSIONER McMURRIAN: Okay.

MR. CARVER: What dPi charges its customers, that reference is the first amended -- I'm sorry. That was the first amended direct testimony, Page 3, Footnote 1, that I just told you about.

COMMISSIONER McMURRIAN: Okay.

MR. CARVER: The other reference was to the first amended rebuttal testimony, and it begins on Page 3, Line 4, and it ends on that same page at Line 7. So that was the reference that I meant to make earlier.

COMMISSIONER McMURRIAN: Okay. Thank you. Okay. We will take that under advisement and issue a ruling later.

I believe. I believe that gets us through all the pending motions. Am I correct?

MS. TAN: Yes. All that's left at this time would be pending confidentiality motions.

COMMISSIONER McMURRIAN: Okay.

MR. MALISH: I have a housekeeping question.

COMMISSIONER McMURRIAN: Sure.

MR. MALISH: On, for example, the motion to strike that we filed with regards to Ms. Tipton, Ms. Tipton's testimony, is there going to be an opportunity for oral argument like we just did on this one in connection with that one?

COMMISSIONER McMURRIAN: I wasn't planning on it, I guess, because I was, because it was filed just yesterday. I was going to give AT&T an opportunity to file on paper.

MR. MALISH: The reason that I ask is because the way that I read the rule is that if we have an objection to the testimony, we have to have it on file before today's hearing that we're doing right now. And the way things were originally scheduled, we were going to be taking Ms. Tipton's deposition this morning prior to this hearing right now. It hasn't happened that way so far. The reason that I bring it up is because we will be ascertaining things during her deposition in which she will be admitting that she doesn't have first-hand knowledge about any of this stuff and all of her knowledge is hearsay evidence.

I can produce transcript testimony from North Carolina and I can produce deposition from North Carolina on this issue, but I had hoped to have, to have been able to have presented to the tribunal that -- you know, a deposition from here in Florida. So I guess at this point it would be supplementing something after the fact rather than having it

for you before you actually take it up. That's why I asked.

COMMISSIONER McMURRIAN: So what I hear you saying is some opportunity for oral argument, not today because you want to --

MR. MALISH: At any point before y'all make the decision.

MS. HELTON: Commissioner, that's not typically our practice to provide opportunities for oral argument when motions are filed. And, in fact, I think that -- I was going to say that I think that our rules require oral argument requests, but our rule was recently amended and, quite frankly, I can't remember if it requires it for these types of motions or not, so I better not go down that path. But that's not our practice. For typical discovery type matters or prehearing matters like this we don't -- usually the motion and the response by the opposing party is sufficient and I'm not sure that oral argument is necessary.

As far as the timing goes, we put the requirement in the Order Establishing Procedure to file motions to strike of prefiled testimony prior to the time of the prehearing conference to avoid these types of issues at the hearing. We found that they were taking up way too much time, and the preference was to get to the meat of the matter and not deal with motions to strike there. So the goal by requiring motions to strike by the time of the prehearing conference was so that

they could be ruled on by the time of the hearing and the parties could go forward.

MR. MALISH: Basically then what I would like to be allowed is to have leave to amend, to, if necessary, to include portions of the transcript from the North Carolina proceedings in which Ms. Tipton admits that she has no personal knowledge of the events that go to the heart of this matter. If my motion without is inadequate, it would otherwise be considered inadequate without having that evidence. Again, the reason that I didn't bring it with us is because I had hoped to have it developed during her deposition this morning, but, of course, we haven't had a chance to take her deposition yet, so.

COMMISSIONER McMURRIAN: But the information that you're referring to from North Carolina, that's already happened. I mean, their proceeding is already further along than ours.

MR. MALISH: Right.

COMMISSIONER McMURRIAN: So in your motion to strike you don't address what's happened in North Carolina?

MR. MALISH: Well, I didn't include portions of the transcript. We just said that --

MR. CARVER: I don't mean, I don't mean to interrupt, but I would like to be heard when it's my turn, please.

COMMISSIONER McMURRIAN: Sure. I'll let him finish his thought and I will give you a chance to --

MR. MALISH: What we have done is we have just stated that, we have just stated that she has no personal knowledge of the facts contained within her testimony, is not presented or qualified as an expert.

The actual -- I had hoped to be able to provide y'all with, you know, deposition testimony from this morning, you know, the current most up-to-date thing to back that up. I do have copies of testimony from North Carolina that could also do that, which I guess I could, you know, pull out of my packet and attach to this right now before the, before the thing is over. But, again, it's from North Carolina and it's not from Florida. Whether that matters to y'all, I don't know. But I would have preferred to give you something out of this case in which she admits that she doesn't know anything from her own personal knowledge, and what she knows she gets from having quizzed other people or read other people's documents.

COMMISSIONER McMURRIAN: I probably shouldn't but I'm going to ask this anyway. How were you going to include information from this morning's deposition at this afternoon's prehearing?

MR. MALISH: Well, I was going to say during her deposition she admits that this has happened, and as soon as we get a transcript we can show you.

The reason that this is important is because under y'all's rules, under 28-106.213 regarding evidence, (3),

hearsay evidence, the provision that we're relying upon here is that hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding, unless the evidence falls within an exception to the hearsay rules found in Chapter 90 of the Florida Statutes.

We know from having been through this proceeding elsewhere, namely North Carolina, that Ms. Tipton is essentially an employee of BellSouth. And we refer to her as a trained witness, and I know that they take, you know, offense at that, but the fact of the matter is that her job is to go investigate things and then provide a report. So instead of presenting the individuals that were actually involved in these dealings at the time, they send a person to go make an investigation. We are forced into dealing with that person as opposed to the actual source of the knowledge. And, you know, so we know as a matter of record already that she has no personal knowledge of the facts that go to the LCCW waiver dispute because she's admitted it in the past. Now she may change her testimony here in Florida, I don't know, but that's one of the things that we're trying to pin down.

COMMISSIONER McMURRIAN: Mr. Malish, I just want to, I want to -- I've afforded you a lot of latitude, but we talked earlier about whether or not to have oral argument. I did ask you a question and so I sort of invited more discussion there,

and I do want to give Mr. Carver a chance to speak up on this, but I don't really want to get into oral argument on the motion to strike.

I guess what I'm trying to deal with is the procedural question of -- I think what you're asking, is there any way for you to add to your motion to strike at this point. And you're saying that you were trying to abide by what the OEP set out and to make a filing by today. But I think that, it sounds like the information that you're even talking about adding is something that you could have added yesterday, quite frankly, the North Carolina information.

MR. MALISH: Well, I can add it right now.

COMMISSIONER McMURRIAN: Well, hold on. Hold that thought and let me hear from Mr. Carver, and then we'll hear from staff about whether or not there's any way for you to amend your motion to strike somehow now.

Mr. Carver.

MR. CARVER: Thank you. I'm not going to respond to the substance because I haven't even read the motion yet, it was filed very late yesterday, but there are a couple of points I want to make.

Mr. Malish has known that he's had this concern with Ms. Tipton's testimony since the North Carolina case was tried. That case was tried March the 1st, 2006. When she testified in North Carolina, he objected to her testimony going into the

record at that time. I don't think he filed a formal motion to strike, but he had a problem then, he argued it before the Commission, he lost. If he knew he was going to argue it again before this Commission, he's had a year and a half to get ready for it because it was literally March 1st when it happened. Instead of filing this in a timely fashion, he waits until 5:00 the day before the prehearing to file this. So at this point there is a tremendous delay and the delay is entirely attributable to dPi.

Beyond that, he said that he wanted to use the deposition this morning. Well, the deposition was originally set by staff. DPi didn't even set the deposition until he cross-noticed it, I believe, yesterday afternoon. And this case came out of abatement some time ago. He's had three or four months, and he could have set Ms. Tipton's deposition at any time if he wished to, but he didn't. So at that point having had this transcript, the one I'm holding, for a year and a half and not setting the witness's deposition, I just think from an equitable standpoint there's no reason to allow him to amend.

COMMISSIONER McMURRIAN: And, Mr. Carver, you're not, from what I hear you saying, since you haven't read this motion yet you're not prepared to give any oral argument on this today.

MR. CARVER: No. All I, all I know is Ms. Tipton is

basically functioning the same way as pretty much every company witness at every Commission hearing for years and years. But beyond that, I don't know the specifics of his objection to that practice.

COMMISSIONER McMURRIAN: Well, I'd, I'd prefer not to get into any more oral argument than we've already had on whether or not Ms. Tipton's testimony should be allowed. And I've already afforded a lot of latitude to both of you and I've created some confusion there.

MR. CARVER: I apologize.

COMMISSIONER McMURRIAN: It's quite all right, both of you, because I, again, I think I sort of opened up the door.

But I think, given, and we talked about this earlier, Mr. Malish, on the other motion that came in yesterday you sort of volunteered to orally argue it here today instead of filing a written motion, but I would have given you the opportunity to do it in writing, and that's what I think that -- before I came in here today I planned to give you both an opportunity for the motions that were filed yesterday to file a response in writing in a few days. And if BellSouth or AT&T Florida, I have a lot of trouble with that too, were prepared to do that today --

MR. CARVER: So do I.

COMMISSIONER McMURRIAN: -- if they were prepared to do that today, we could do it that way and then take it under advisement. But I really think it's just a substitute for

having the opportunity to have a written filing. And normally we would afford more time for a response, but I think in this case because we're getting so close to the hearing we're not going to be able to give the normal amount of time for responses.

Ms. Helton or Ms. Tan, do you have any thoughts as -- I think you've already addressed the oral argument issue.

MS. HELTON: I think at this point it would be appropriate to set the time specific for AT&T to file a written response to the motion to strike and we could go forward with the prehearing.

COMMISSIONER McMURRIAN: And we talked about this a little bit earlier and I think we talked about Monday. But perhaps Friday. Can you do Friday?

MR. CARVER: Yes. If I can have until the end of the day, then, yes, I can do Friday.

COMMISSIONER McMURRIAN: And, Ms. Helton, I'm going to bring it up again. Procedurally is there any way for a party to in essence amend a motion to strike? I mean, I think that -- frankly, I think that it creates some burden on the other party to respond if the target keeps moving, quite frankly, Mr. Malish, and that's sort of the reason for having some deadline for filing a motion so that then we have --

MR. MALISH: Well, if I may respond. In this particular case, Mr. Carver has already said that he hasn't

even seen it yet, so he doesn't know what's in it. So he can't be prejudiced if he gets it before the end of the day presumably. I have copies of it here. I just need to make copies. And all he will be seeing is the actual portions of the depositions in, in Georgia and in North Carolina where Ms. Tipton says, admits that she doesn't have personal knowledge.

The, the written motion contains the motion, it just doesn't contain any, you know, evidence because it's supposed to be an argument, this is our motion, this is our argument. And --

COMMISSIONER McMURRIAN: But, Mr. Malish, I think that's the reason we have the deadlines. I mean, you have the ability to file whatever information you have at the time in whatever motion you put forth before the Commission. So in my opinion and from the things you've said you could have included with your motion to strike attachments or exhibits and things like that and you didn't.

MR. MALISH: Well --

COMMISSIONER McMURRIAN: I think that it's probably best we move on. I had asked Ms. Helton a question, and so I'll give her a chance to give input, and then I think we should move on.

MS. HELTON: I was looking for the reference in the order establishing procedure and I can't find it promptly, but I think it requires a motion to strike to be filed prior to the

prehearing conference. It sounds to me as if Mr. Malish has had sufficient time to do that. I think we're in Florida now, not North Carolina, and I would -- my suggestion to you would be that he not be allowed to amend, but that AT&T be allowed to respond by -- I think Mr. Carver has agreed to the end of Friday, close of business on Friday.

COMMISSIONER McMURRIAN: And Mr. Malish and dPi will have -- I guess given -- depending on the outcome, I guess, of the motion to strike, there will, there will possibly be further opportunities to take issue with testimony, if it does proceed.

MS. HELTON: By inserting the requirement to file motions to strike prior to the prehearing conference, it in no way limits the parties' abilities to raise any type of evidentiary objections during the course of the proceeding.

COMMISSIONER McMURRIAN: And, Mr. Malish, if you have further questions, procedural questions and all about those issues, again, I encourage you to talk with Ms. Tan or Ms. Helton offline. Again, I think we're always more than happy to help procedurally, understanding our rules and procedures here and how they may differ. We definitely want to help you out.

MR. MALISH: Thank you.

COMMISSIONER McMURRIAN: Moving along to pending confidentiality motions. Ms. Tan.

MS. TAN: There are three pending confidentiality requests at this time, all of which will be addressed by separate order.

COMMISSIONER McMURRIAN: Any questions or concerns?

MR. CARVER: If I could add one thing I hope will be helpful. What we've designated as confidential is for the most part dPi information that has to do with their accounts. I know a lot of times handling confidential information during a hearing can be cumbersome, so I just wanted to say that we've only requested for confidentiality to try to protect their information. If they want it to be -- you know, if they don't want it to be confidential, then they can certainly waive that and it would make things easier. If they want it to be confidential, that's fine. But, again, we've only made the request to try to protect them.

MR. MALISH: If it'll streamline the position or, excuse me, the proceeding, we'll be willing to waive it on those particular issues because it's just not that important.

COMMISSIONER McMURRIAN: Is that on all three pending confidentiality requests?

MR. MALISH: Yes. Correct.

MR. CARVER: Well -- I'm sorry. The first one, Number 1-22 of AT&T Florida's response to dPi's request for information, that is AT&T information that needs to remain confidential.

COMMISSIONER McMURRIAN: Okay. So the one that's listed Number 1?

MR. CARVER: The last part of Number 1. I think everything else in Number 1 is dPi information.

Going through -- in other words, 1-3, 1-16 and 1-17 is dPi. 1-22 is AT&T, and we do need for that to be treated confidentially.

COMMISSIONER McMURRIAN: Okay. And then Number 2 and Number 3, that's also --

MR. CARVER: Waived.

COMMISSIONER McMURRIAN: No, that wouldn't be. All right. Let's take them one at a time.

So under pending confidentiality matters on Page 9 the first item, as I understand it, AT&T Florida's response to dPi's request for information Numbers 1-3, 1-16 and 1-17 are with respect to information that you believe that dPi wants to keep confidential. And if they're willing to waive that, then that portion of the request could be made moot?

MR. CARVER: Yes, that's correct.

MR. MALISH: And we waive that.

COMMISSIONER McMURRIAN: Okay. And with respect to 1-22, that's information you still seek to keep confidential.

MR. CARVER: Yes, ma'am.

COMMISSIONER McMURRIAN: Okay. And then Number 2, direct testimony of Pam Tipton, Exhibit PAT-3.

MR. CARVER: It would take just a moment to check.

COMMISSIONER McMURRIAN: I assume that's AT&T Florida's request; right?

MR. CARVER: Yes. That would be dPi information also. So if they want to waive that, that's okay with us.

COMMISSIONER McMURRIAN: And, Mr. Malish, I just want you to understand I'm not trying at all to pressure you to waive confidentiality.

MR. MALISH: Well, we're just waiving with respect to these particular things, so, yeah.

COMMISSIONER McMURRIAN: Okay. So you do waive with respect to Ms. Tipton's testimony exhibit PAT-3?

MR. MALISH: Correct.

COMMISSIONER McMURRIAN: Okay. So we'll show that as moot. And Number 3, AT&T Florida's response to staff's first request for production of document request Numbers 3 and 6, is that also dPi information?

MR. CARVER: Yes, it is.

MR. MALISH: We waive it.

COMMISSIONER McMURRIAN: So we'll show that one as moot as well.

So that only leaves the response to dPi's request for information 1-22, and we'll rule on that later. Thank you.

I probably should note if anyone decides to use anything that is determined confidential at the hearing, it's

normal practice to let the attorneys know as soon as possible just so that we can plan for how to make sure the information remains confidential throughout the course of the hearing. We use red folders and such.

MS. TAN: Right. And staff would just direct the parties to look at Section VII of the Order Establishing Procedure, which is titled Use of Confidential Information at Hearing.

COMMISSIONER McMURRIAN: It seems like that's not going to be as much of an issue as we thought, but thank you all again.

Section XIII on posthearing procedures. There is one reference in the Prehearing Order that I think we probably need to clear up. On Page 10, if I'm looking at the right copy, the very last paragraph before the ruling section, and it references briefs, a total number of pages of 40, but I believe in the OEP on Page 8, the Order Establishing Procedure, we originally set that out as 20 pages. Any concerns with that?

MR. MALISH: That's fine by dPi. 20 pages?

COMMISSIONER McMURRIAN: 20 pages, uh-huh. And we'll correct that before we send out the final version, but --

MR. CARVER: Could we have 25?

COMMISSIONER McMURRIAN: Any objection?

MR. MALISH: No objection. I'm assuming that doesn't account for like attachments like exhibits or something like

that.

COMMISSIONER McMURRIAN: Ms. Tan, I'm not sure of the answer to that question. Do we usually have attachments to briefs? Is there any prohibition?

MS. HELTON: I've been trying to think back to attachments on briefs and I can't recall seeing any. I mean, I think the typical practice would be to refer to an exhibit in the record, that's what should be attached, and you could just refer us to the exhibit number that's established at the time of the hearing. And we have those exhibits or will have those exhibits here, the Commissioners will have those exhibits here. There's no need to file an attachment. That I think just wastes paper.

MR. MALISH: Yeah. I've done it in the past just so that someone can flip right to it instead of having to go dig something out, especially if it was something fairly small, but --

MS. HELTON: And that's appreciated, but I don't think it's necessary here in Florida.

COMMISSIONER McMURRIAN: Mr. Malish, that's my understanding as well. I just, you know, frankly it's probably more work for you than you need to do. And as I understand it, it should just be limited to the things that are already in the record, unless perhaps you were referencing some order of the Commission or something like that that would be possible to

reference.

So 25 pages. And we are able to amend that here. I'm able to amend that.

MS. HELTON: Yes.

COMMISSIONER McMURRIAN: Okay. And I understand that AT&T has asked for a change in the due date for briefs. Mr. Carver?

MR. CARVER: Yes, ma'am. I think there are two weeks of what's allowed in the schedule, and we'd like to request an additional week, so it would be 21 days. In other words, rather than October 15th, it would be October 22nd.

COMMISSIONER McMURRIAN: Mr. Malish, do you have any objection? The due date for the briefs after the hearing is now scheduled for October 15th according to the Order Establishing Procedure, but Mr. Carver is suggesting moving that to a due date of October 22nd.

MR. MALISH: Generally speaking -- sorry. Generally speaking, we don't have an objection to that. I was curious as to whether, whether there's any sort of account taken with regard to how long it takes to get a transcript generated from the hearing. Is it --

COMMISSIONER McMURRIAN: I believe we have a transcript deadline that's associated with --

MR. MALISH: Is it like three weeks from when the transcript comes out or is it just three weeks from the

hearing, period, even if the transcript doesn't come out until a day before the three weeks is over?

MS. HELTON: That date would have been established internally, and I think Ms. Tan is checking to see what that is, unless Ms. Boles knows.

Typically, I mean, the maximum that usually we allow our court reporters, our wonderful court reporters is two weeks, but they often do a great job getting it to us before then. This is set for one day or two days?

COMMISSIONER McMURRIAN: I believe it's one day.

MS. TAN: It's set for one day. I believe testimony, I mean, the testimony transcript for, I mean, excuse me, hearing transcript, if I'm not mistaken, is due October the 8th, but I would, that would be subject to check.

MS. HELTON: So that sounds like about a week to me. So you'd be getting the transcript within a week or a week plus a day.

MR. MALISH: Yeah. That would be fine. So it's basically two weeks after the transcript comes out. Yeah.

COMMISSIONER McMURRIAN: And someone on staff can check. And I understand your depositions are continuing later today, and they can get that date for you before the end of the day and let you know for sure.

MS. TAN: It is the 8th at this time.

COMMISSIONER McMURRIAN: It's the 8th. Okay.

MS. TAN: It's currently reflected as the 8th.

COMMISSIONER McMURRIAN: Okay. So the October 22nd deadline for briefs would give you more time. Any objection, Mr. Malish?

MR. MALISH: No objection.

COMMISSIONER McMURRIAN: Okay. All right. Show the new due date for the briefs October 22nd. I guess that's close of business.

And that brings us to the last section on rulings, and I guess this brings us back to the discussion about opening statements.

MS. TAN: Staff's recommendation would be ten minutes.

COMMISSIONER McMURRIAN: And just from memory, I believe we had -- Mr. Carver said ten minutes was adequate and, Mr. Malish, you said --

MR. MALISH: I was asking for 20. I find that a comprehensive opening ends up streamlining the whole process and shortens the amount of, the entire amount of time needed for the hearing because it focuses the decision-makers on, you know, the parts of the story that they have the most interest in and where they need to get the meat out if it's not already presented before them. So that's why I asked. I think that it sounds like a lot, but in the end it saves time. So that's why I asked for 20 minutes.

MR. CARVER: And my objection to that, Mr. Malish earlier mentioned the PowerPoint presentation. It sounds like he has something fairly elaborate planned. And I don't have a problem with an opening statement for the attorneys to sort of lay out in general what their case is, but I think it serves everybody's interest to avoid a situation were the attorneys are testifying at great length. So, I mean, to have counsel for one party spend 20 minutes going through a PowerPoint presentation and essentially arguing the evidence that hasn't been admitted yet on a two-issue case, I don't really think that's the best use of the Commission's resources. So to me I think it's better to have a short one and move on.

MR. MALISH: Well, Commissioner, I mean, you know, whether it's with a PowerPoint or not, obviously the only thing that's being put out there is this is what we expect the evidence to show and this is what you should look for and this is where to find it. And, of course, it's easier to process information if you see it both, you know, if you both see it and hear it as opposed to just one or the other.

COMMISSIONER McMURRIAN: Mr. Malish, I missed the part about the PowerPoint, so I did want to clarify you do intend to use the PowerPoint? I just think that we need to be prepared for any setup issues with respect to that. And I did want to ask our staff, are there any problems with using a PowerPoint in the presentation?

MS. HELTON: I think that might be best -- we might need to direct that question to Mr. Staden. I don't know, given the technical difficulties we've had recently with the system, whether that's something that we can do or not.

COMMISSIONER McMURRIAN: I'm glad you brought it up now because those are the kind of things -- I mean, in the same vein of getting some kind of notice about using demonstrative exhibits, the purpose is just so that we can be prepared. But we can work on that after the fact. I just, I was asking you, Ms. Helton, if there are any procedural problems in using PowerPoint. This is the first time I've had this come up in a prehearing.

MS. HELTON: Can we take that under advisement and let's think about it a little bit?

COMMISSIONER McMURRIAN: Yes. And as far as the time, I think you're catching me in a generous mood today in saying 15 minutes. My inclination is usually to keep it shorter, Mr. Malish. I think ten minutes is usually a gracious plenty, especially in a, in a two-issue case. But having heard what you've said, 15 minutes, I think, is a reasonable amount of time. And, of course, Mr. Carver, you would also get 15 minutes. And we will look into the issue of PowerPoint. But I'm glad you let us know that you might be planning on using that. Maybe if you could follow up, if you're not sure if you plan to use it or not, but if you could let them know when

you've decided and we can try to make sure if there are any concerns.

MS. HELTON: And maybe, too, if we can have a conversation, you know, I don't think it has to be now, you know, when the prehearing conference concludes between dPi and AT&T and staff to understand exactly what's going to be in the PowerPoint presentation, how it would be used and whether AT&T would have the same opportunity.

COMMISSIONER McMURRIAN: Ms. Helton, one more thing about what was stated by Mr. Carver about having attorneys testifying. I mean, that's something, that's another reason, frankly, Mr. Malish, for keeping it a little bit shorter. What are our procedural rules, for instance, on how much latitude the attorneys have in their opening statements?

MS. HELTON: Well, obviously it has to be directed towards what's the evidence that will be presented in the case, and it is not appropriate for attorneys to use opening statements as an opportunity to testify. It would not be -- it's supposed to be the groundwork for the case to help the tribunal better understand what the evidence is that they're going to be hearing and how it's relevant to the ultimate resolution of the case.

COMMISSIONER McMURRIAN: And the same way with witness testimonies, you wouldn't want your witness to get outside the scope of the testimony that they've prefiled.

Okay. Well, we will take several matters under further advisement and get back to you all. And are there any other matters to address in this prehearing conference before we adjourn? Hearing none, this prehearing is adjourned. Thank you.

(Prehearing Conference adjourned at 3:32 p.m.)

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 19th day of September, 2007.

LINDA BOLES, RPR, CRR
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