Matilda Sanders

From: Woods, Vickie [vf1979@att.com]
Sent: Friday, September 21, 2007 12:28 PM
To: Filings@psc.state.fl.us
Subject: 050863-TP (dPi) AT&T's Response in Opposition to dPi's Motion to Strike
Attachments: 050863-T.pdf

A. Vickie Woods
Assistant to James Meza III, Manuel A. Gurdian,
and Tracy W. Hatch
AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vf1979@att.com

B. Docket No. 050863-TP: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.

C. BellSouth Telecommunications, Inc.
on behalf of Manuel A. Gurdian

D. 9 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to dPi's Motion to Strike

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at&t

Manuel A. Gurdian
Attorney
Legal Department

AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

T: (305) 347-5561
F: (305) 577-4491
manuel.gurdian@att.com

September 21, 2007

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 050863-TP: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to dPi's Motion to Strike, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

cc: All parties of record
Jerry Hendrix
E. Earl Edenfield, Jr.
James Meza III

CERTIFICATE OF SERVICE
DOCKET NO. 050863-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, First Class U. S. Mail and (*) Federal Express this 21st day of September, 2007 to the following:

Theresa Tan
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
ltan@psc.state.fl.us

Christopher Malish (*)
Steven Tepera (+) (*)
Foster Malish Blair & Cowan LLP
1403 West Sixth Street
Austin, TX 78703
Tel. No. (512) 476-8591
Fax. No. (512) 477-8657
chrismalish@fostermalish.com
steventepera@fostermalish.com
Counsel for dPi

DPI-Teleconnect, LLC
2997 LBJ Freeway, Suite 225
Dallas, TX 75234-7627
Tel. No. (972) 488-5500 x4001
Fax No (972) 488-8636
ddorwart@dpiteleconnect.com

Manuel A. Gurdian

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.	)	Docket No. 050863-TP
	)	Filed: September 21, 2007

AT&T FLORIDA'S RESPONSE IN OPPOSITION TO DPI'S MOTION TO STRIKE

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida"), submits this Response in Opposition to dPi Teleconnect, LLC's ("dPi") Motion to Strike Testimony of Pam Tipton ("Motion"). For the following reasons, the Florida Public Service Commission ("Commission") should deny the Motion.

Background

1. Pursuant to the Commission's July 9, 2007 Order Modifying Procedure, on July 23, 2007, AT&T Florida filed the direct testimony of Pam Tipton. On August 20, 2007, AT&T Florida filed the rebuttal testimony of Pam Tipton. On September 17, 2007, dPi filed its Motion to Strike the Testimony of Pam Tipton.

Argument

2. dPi has moved the Commission to strike the testimony of Pam Tipton in its entirety on the basis that she "has no personal knowledge of the facts contained within her testimony and is not presented or qualified as an expert."

3. dPi's Motion should be denied for the simple fact that it does not specifically identify which portions of Ms. Tipton's testimony it is moving to strike. The motion does not even distinguish between Mr. Tipton's direct or rebuttal testimony let alone which passages dPi alleges to be hearsay. Without a description as to which portions are alleged as "hearsay" a meaningful analysis of the allegation is not possible. Moreover, to the extent there is any merit to dPi's argument, it is more appropriate for its

post-hearing brief where dPi can specifically argue which sections it considers "inadmissible hearsay". However, in the event the Commission considers dPi's Motion, AT&T Florida responds to dPi's Motion below.

4. The rules of evidence in administrative hearings are liberal. *See In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Docket No. 060635-EU, Order No. PSC-07-0033-PCO-EU (Issued January 9, 2007). The types of evidence that may be received in administrative proceedings is as follows:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial on the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Florida Statutes § 120.569(2)(g). Section 90.401, Florida Statutes, defines "[R]elevant evidence [as] evidence tending to prove or disprove a material fact."

5. Thus, evidence admissible under the Florida rules of evidence is admissible in an administrative hearing, and evidence inadmissible in civil courts but "of a type commonly relied upon by reasonably prudent persons," F.S. 120.569(2)(g), is also admissible in administrative hearings. In administrative hearings under Chapter 120, Florida Statutes, hearsay is admissible and "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but it shall not be sufficient to support a finding unless it would be admissible over objection in civil actions." F.S. 120.57(1)(c). *See also* Rule 28-106.213(3), Florida Administrative Code ("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 rule in Chapter 90, F.S.").

6. Pam Tipton's direct and rebuttal testimony is not hearsay and is relevant to Issues 1 and 2 as established by the Commission in the instant proceeding. Ms. Tipton testifies on the following matters within her personal knowledge: 1) her analysis of the promotional and tariff language in dispute; 2) her investigation and review of dPi's allegations in its Complaint; 3) AT&T Florida's positions on the Issues 1 and 2 as established by the Commission; 4) her analysis of the parties' Interconnection Agreement; 5) the promotional credit validation process; 6) her analysis of why dPi does not qualify for the promotional credits at issue; 7) how AT&T Florida has reviewed dPi's credit requests and the results of the review; and 8) the outcome of hearings in North Carolina in which Ms. Tipton was a witness.

7. Even assuming, *arguendo,* that Ms. Tipton's testimony is hearsay, the testimony is clearly admissible. Since dPi's motion rests solely on a bare allegation of hearsay, it should be summarily denied on that basis. The only limitation placed on hearsay under Chapter 120 is that it not be the sole basis for a finding of fact. For that analysis to occur, it must be admitted to the record in the first place.

8. In the event that the Commission determines that portions of Ms. Tipton's testimony are hearsay, the Commission should still deny dPi's Motion. Florida Statutes § 120.57(1)(c) provides that hearsay evidence "may be used for the purpose of supplementing or explaining other evidence." In *In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Docket No. 060635-EU,

Order No. PSC-07-0033-PCO-EU, (Issued January 9, 2007), Commissioner McMurrian, as Prehearing Officer, agreed that certain portions of a party's witnesses' testimony was hearsay. However, she noted that Rule 28-106.213(3), F.A.C. provides 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 rule as found in Chapter 90, F.S." Commissioner McMurrian denied the party's Motion to Strike certain portions of the witnesses' testimony and exhibits on the basis of hearsay and stated that the "Commission may consider those portions of the testimony and exhibits to the extent that they supplement or explain other evidence in the record."[1] *See also, In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Docket 060635-EU, Order No. PSC-07-0034-PCO-EU and Order No. PSC-07-0035-PCO-EU, (Issued January 9, 2007)(Where a party's Motion to strike certain portions of a witness' testimony and exhibits on the basis of hearsay was denied).

9. Ms. Tipton is also an expert in the field of Interconnection Agreements and the disputes that arise out of those agreements. An expert is permitted to express an opinion on the matters in which the witness has expertise when the opinion is based upon facts which the expert personally knows, is in response to a hypothetical question, or is in response to facts disclosed to the expert at or before trial. *See* Erhardt, Florida Evidence, (2006 Ed.) Section 702.1, p. 688-89. *See also, In re: Application for amendment of*

[1] In her Order, Commissioner McMurrian did strike other exhibits to the witnesses' testimony on the basis that the exhibits were not referenced or incorporated anywhere in the witnesses' prefiled testimony. In the instant case, however, Ms. Tipton references and incorporates her exhibits into her testimony and, thus, the basis for the striking of certain exhibits in the above-referenced Commission decision are not found here.

Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation, Docket No. 991666-WU, Order No. PSC-01-1919-PCO-WU (Issued September 24, 2001) (where the Commission held that a witness may offer opinion testimony or conclusions based on facts within the record). To the extent Ms. Tipton's testimony is opinion testimony, consistent with the Commission's practice to presume a witness to be an expert in the field to which he or she is testifying, Ms. Tipton should be allowed to give her testimony. *See In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Docket No. 060635-EU, Order No. PSC-07-0033-PCO-EU (Issued January 9, 2007) (Where Commissioner McMurrian, as Prehearing Officer, held that it is the "Commission's practice to presume a witness to be an expert in the field in which he or she is testifying, [the witness] shall be allowed to give her opinion testimony. Thus, upon conclusion of the cross-examination of [the witness] at the hearing and upon consideration of her testimony as a whole, the Commission will be able to afford [the witness'] testimony the proper weight it deserves"). Thus, consistent with Commission practice, upon conclusion of the cross-examination of Ms. Tipton at the hearing and upon consideration of her testimony as a whole, the Commission should be allowed, at least the opportunity, to afford Ms. Tipton's testimony the proper weight it deserves. *See id.*

10. Furthermore, dPi complains in its Motion that "dPi is placed in the position of only being about to question an opposing party through a witness that has only knowledge of selected facts from conversations with other people. The Commission will get an incomplete picture of the situation, unfairly slanted toward BellSouth/AT&T

because AT&T will be able to meaningfully cross-examine dPi's witnesses while dPi will not because Tipton will have no knowledge of the basics of dPi's questioning." However, dPi has had ample opportunity to conduct discovery in this matter and to depose any AT&T employees that dPi believes would contradict Ms. Tipton's direct and rebuttal testimony. If dPi had deposed these witnesses, and the witnesses provided testimony inconsistent with Ms. Tipton's testimony, their testimony could have been used by dPi to cross-examine Ms. Tipton at hearing. For whatever reason, dPi chose not to depose these witnesses in this proceeding.[2]

11. Finally, to the extent Ms. Tipton, as a representative of AT&T Florida conferred with other employees to prepare her pre-filed testimony, dPi witnesses have done the same. During his deposition on Tuesday, September 18, 2007, Steve Watson (who submitted most if not all of dPi's credit requests) testified that his company, Lost Key, has four employees other than himself, and that all four dealt with AT&T during the timeframe covered by dPi's Complaint. Moreover, dPi's proposed hearing exhibit, dPi FL-5 contains e-mail correspondence that shows that a substantial amount of the communication dPi plans to place into evidence occurred between AT&T employees and dPi employee, Chris Watson. Chris Watson is not a witness in the case. Thus, Steve Watson is doing precisely what dPi accuses Ms. Tipton of doing. He is testifying about the interaction of employees of Lost Key (on behalf of dPi) and AT&T even though he does not have direct personal knowledge of all these interactions.

12. As a practical matter, if the Commission required each company that comes before it to present its case through an assembly of every employee with

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[2] In contrast, in the North Carolina proceeding, dPi did depose AT&T employees other than Ms. Tipton, and could have done so again in this case.

involvement in the case, then parties would have to present tens of witnesses, and the hearing process would become completely unworkable.[3] There is no requirement to conduct hearings in this manner and innumerable practical reasons that the Commission should avoid this unwieldy approach.

WHEREFORE, for the foregoing reasons, AT&T Florida respectfully requests that the Commission deny dPi's Motion to Strike Testimony of Pam Tipton.

Respectfully submitted this 21st day of September 2007.

AT&T FLORIDA

JAMES MEZA III
AUTHORIZED HOUSE COUNSEL NO. 464260
TRACY W. HATCH
MANUEL A. GURDIAN
c/o Gregory R. Follensbee
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

E. EARL EDENFIELD JR.
J. PHILLIP CARVER
AT&T Southeast
Suite 4300, AT&T Midtown Center
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0710

691445

[3] For example, in this case, dPi has noticed the Deposition of Ms. Tipton and indicated an intention to question her (among other things) about promotions from January 1, 2002 to the present. Hundreds of promotions were filed by AT&T during this timeframe, and the individuals having direct personal knowledge of each promotion would likely number well over a hundred.