**Ruth Nettles**

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**From:** Smith, Debbie N. [ds3504@att.com]
**Sent:** Friday, March 14, 2008 1:08 PM
**To:** Filings@psc.state.fl.us
**Cc:** Carver, J; Gurdian, Manuel; Tracy Hatch; Woods, Vickie; Eller, Perry; Holland, Robyn P; Follensbee, Greg
**Subject:** Florida Docket No. 050863-TP
**Importance:** High
**Attachments:** response.pdf

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

C. BellSouth Telecommunications, Inc.
on behalf of J. Phillip Carver

D. 14 pages total (includes letter, pleading and certificate of service)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to dPi's Motion for Leave to File Supplemental Testimony and Additional Direct Testimony.

<<response.pdf>>

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March 14, 2008

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 for Leave to File Supplemental Testimony and Additional Direct Testimony, 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,

J. Phillip Carver

cc: All parties of record
Gregory Follensbee
E. Earl Edenfield, Jr.
Lisa S. Foshee

**CERTIFICATE OF SERVICE**
**DOCKET NO. 050863-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 14th day of March, 2008 to the following:

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**(+) 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: March 14, 2008 |

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO dPi'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL TESTIMONY AND ADDITIONAL DIRECT TESTIMONY**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida"), hereby files its Response In Opposition to the Motion for Leave to File Supplemental Testimony and Additional Direct Testimony filed by dPi Teleconnect, L.L.C. ("dPi"), and states the following:

## I. INTRODUCTION

1. dPi's Motion should be denied in its entirety. dPi's Motion to file the Direct Testimony of Steven Tepera should be denied because it is based upon information that dPi has had in its possession for more than four months, and Mr. Tepera's analysis of this information has been completed for almost three months. Given this, there is no justification for dPi's failure to file this testimony at an earlier date. There is even less justification for dPi's failure to timely file the Supplemental Testimony of Brian Bolinger. Mr. Bolinger's testimony contains a single section of approximately one page that refers to the information that is the basis of Mr. Tepera's testimony. Beyond this, Mr. Bolinger's testimony is composed entirely of information that was in dPi's possession well before dPi filed Mr. Bolinger's Amended Rebuttal Testimony in this proceeding in September of 2007.

2. Moreover, the extremely late filing of both sets of testimony reflects a continuing pattern of improper and/or untimely filings by dPi, which appear to be calculated to disadvantage AT&T Florida. In this particular case, allowing this testimony to be filed at this late date would

prejudice AT&T Florida by hampering its ability to prepare for the hearing that is set for April 3, 2008, i.e., less than three weeks from the present. AT&T Florida would be further disadvantaged by being deprived of the time necessary to review the 1088 pages of exhibits appended to the testimony of these two witnesses, to conduct discovery or to prepare rebuttal testimony. Finally, the testimony relating to materials AT&T Florida produced in response to dPi's Request No. 1-19 is irrelevant to any issue in this proceeding and has no probative value whatsoever. dPi should not be allowed to late file testimony and voluminous materials that are *also* irrelevant.

## II. DISCUSSION

### A. dPi Cannot Justify Its Attempt to Belatedly File the Direct Testimony of Steven Tepera.

3. dPi attempts to justify the untimely filing of the Direct testimony of Steven Tepera by claiming that it is based on information that AT&T was compelled to produce by the Florida Public Service Commission ("Commission"), and that the analysis of this information was very time consuming. As an initial matter, dPi's contention that AT&T Florida was compelled to produce this information by the Commission is an often repeated fabrication by dPi, and it is obviously untrue. AT&T Florida initially objected to dPi's discovery request No. 1-19 because this request was irrelevant and because it was tremendously burdensome. Although this request is objectionable for these reasons, AT&T Florida, nevertheless, offered a compromise after dPi filed its Motion to Compel. Specifically, AT&T Florida offered to produce the requested information that could be extracted from its ordering systems, which corresponds to the years 2005 to 2007. dPi rejected this offer and insisted that it also needed data for the years 2003 and 2004. The Commission ruled specifically that producing the data for

the entire time frame requested would be burdensome.[1] On September 26, 2007, AT&T Florida produced the data for 2005 through 2007. Then, AT&T Florida produced on November 9, 2007 the requested information for 2003 and 2004 as well, even though it was under no obligation to do so. Thus, dPi has had the first batch of information in its possession for almost six months and the second batch for slightly more than four months.

4. Based on this discovery, Mr. Tepera filed on December 17, 2007 an Affidavit before the North Carolina Utilities Commission to support dPi's Motion for Reconsideration. dPi's Motion for Reconsideration had been previously filed on November 19, 2007 without verification. dPi took the novel approach of filing its Motion, then filing Mr. Tepera's supporting Affidavit approximately one month later, on the same day that AT&T Florida's Response to dPi's Motion was due. Mr. Tepera's testimony, which dPi seeks leave to submit in this proceeding, is composed of a nine page summary of an attached Affidavit, which is substantively identical to the Affidavit that Mr. Tepera filed in North Carolina on December 17, 2007. This testimony adds no additional information or analysis to what Mr. Tepera provided to the North Carolina Commission almost three months ago. Further, dPi offers nothing in its Motion to explain why it chose to delay the filing of this testimony (and over 1,000 pages of exhibits to the testimony) for three months.

**B. dPi Has Failed To Justify Its Attempt To Untimely File The Supplemental Testimony Of Brian Bolinger.**

5. The delay in filing the Supplemental Testimony of Mr. Bolinger is perhaps even more egregious than the three month delay in filing Mr. Tepera's testimony. Both dPi's Motion and Mr. Bolinger's testimony contain the claim that his Supplemental Testimony has been filed

[1] Prehearing Order (Order No. PSC-07-0787-PHO-TP), p. 10. Although the ruling was that "dPi's Motion is denied in part and granted in part," the Order essentially granted to dPi the discovery that AT&T Florida had offered

so late in this proceeding because it is based on the discovery described above. This claim, however, is belied by the actual substance of Mr. Bolinger's Supplemental Testimony. The only portion of the eleven pages of Mr. Bolinger's testimony that actually relates to this discovery is on page 3, line 13 through page 4, line 12, in which Mr. Bolinger briefly summarizes the same matters that are set forth at greater length in Mr. Tepera's testimony. The remaining ten pages of Mr. Bolinger's testimony concerns other matters, all of which dPi has had knowledge of for long periods of time (in one case for two years), and all of which could have been filed in September of 2007 as part of Mr. Bolinger's Amended Testimony.

6. The first page and a half of Mr. Bolinger's Supplemental Testimony contains dPi's attempt to justify filing the testimony so late. Next, Mr. Bolinger reiterates earlier testimony (page 2, line 10 through page 3, line 12) and even acknowledges that this portion of his testimony addresses matters covered "in earlier testimony" (page 3, line 3). Next, there is the one page reference to the matters raised in Mr. Tepera's testimony. Next, beginning on page 4, line 13 and continuing through page 9, Mr. Bolinger undertakes to rebut Ms. Tipton's testimony, based principally upon a deposition that was taken in the North Carolina proceeding in *February of 2006*. (Bolinger Supplemental Testimony, pp. 5-7). The testimony of Ms. Tipton that Mr. Bolinger responds to was timely filed by AT&T Florida on July 23, 2007. Again, the information upon which Mr. Bolinger bases his rebuttal is a deposition from North Carolina that took place more than two years ago. Yet dPi waited until three and a half weeks before the hearing to file Mr. Bolinger's Supplemental Testimony.

7. Finally, Mr. Bolinger devotes the last three pages of his Supplemental testimony to an attempt to rebut the position of AT&T Florida that dPi can not qualify for the promotions

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as a compromise. (Id).

because its end users did not order anything. Based on the evidence adduced in North Carolina, it is clear that dPi simply placed call blocks on the lines of its customer's without customer requests, and without the customer's consent or knowledge of dPi's actions. AT&T Florida contends that, given these facts, dPi cannot qualify for the promotional discount. dPi was well aware that this would be an issue in the case because it was an issue in the earlier proceeding in North Carolina.[2] dPi apparently made a conscious decision not to address this issue in either its Direct or Rebuttal Testimony.

8. On August 24, 2007, AT&T Florida propounded discovery, which included questions related to dPi's practice of placing call blocks on its customers lines without their knowledge. dPi objected to this discovery. AT&T Florida moved to compel, and its Motion was granted in the Prehearing Order entered on September 27, 2007. (Order No. 050863-TP, p. 11). Six months later, dPi now attempts to file Supplemental Testimony to try to explain or justify its actions. Under any circumstances, it would be questionable for a party to avoid an issue in testimony, stonewall in response to discovery requests, lose the discovery argument, and only *then* try to supplement its testimony to address the point it previously tried to suppress. However, even if this action could be considered proper, if timely, there is no justification for dPi to wait almost six months after the Commission Order made clear that this issue would be a part of the case, then try to supplement the testimony to provide rebuttal on this point.

### C. dPi's Latest Actions Reflect A Continuing Pattern Of Improper Conduct, Which This Commission Should Not Allow.

9. In isolation, dPi's unjustified attempts to file additional testimony on the eve of hearing would be objectionable. Placed in the context of all that has occurred in this case, dPi's

[2] This point was also specifically addressed in Ms. Tipton's Rebuttal Testimony (pp. 8-9), which was filed August 20, 2007.

behavior is just the latest in a continuous series of improper actions by dPi. To date, dPi has propounded two sets of discovery after the discovery period was over,[3] and has twice filed Replies to AT&T Florida's Responses to dPi's Motions that are not authorized under the Commission's Rules.[4] dpi has filed two Motions for the hearing in this matter to be continued so that it can conduct additional discovery, even though the case has been pending for more than two years.[5] Both Motions were denied.[6] More recently, dPi successfully moved to continue the hearing set for March 12, 2007, based on the claim that it was unaware of the setting, and that its attorney had a personal conflict.[7] This last action by dPi is especially telling.

10. On January 23, 2008, dPi filed a Motion to continue the hearing that was set for March 12, 2008, based principally on a personal conflict of dPi's counsel. Based on dPi's representations as to the reason for its Motion, AT&T Florida did not object. dPi's Motion was granted, and the hearing was moved from March 12, 2008 to its current setting on April 3, 2008. Then, on March 7, 2008, five days before the case was previously set for hearing, dPi filed the two subject sets of testimony, with voluminous exhibits. The most charitable possible interpretation of dPi's behavior is that it used a personal conflict to secure a continuance, then utilized the extra time to file testimony that it clearly would have been allowed to file if the hearing had occurred on March 12, 2008. Given all of the above, AT&T Florida submits that the

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[3] dPi's Second Set of Requests for Information, dated November 11, 2007; dPi's Third Set of Requests for Information, dated December 27, 2007.

[4] dPi's Reply to AT&T's Response to Motion to Compel, dated September 21, 2007; dPi's Reply to AT&T's Objection to Additional Discovery, dated February 8, 2008.

[5] dPi's Motion for Continuance, dated July 20, 2007; dPi's Motion for Continuance, dated September 26, 2007.

[6] Order Denying Motion for Continuance, Order No. PSC-07-0712-PCO-TP (August 30, 2007); Order Denying Motion for Continuance, Order No. PSC-07-0701-PCO-TP (September 27, 2007).

[7] dPi's Motion to Modify Procedural Schedule/Move Hearing Date, filed January 23, 2008.

Commission should not allow dPi to profit from its most recent disregard of the Commission's Rules and of the Procedural Schedule set by the Commission in this case.

**D. dPi's Motion, If Granted, Will Cause Prejudice To AT&T.**

11. Clearly, there are only two possible explanations for dPi's behavior: One, dPi did not file this testimony previously as a result of inexcusable neglect. Two, dPi has made a conscious decision to hold back the testimony of these two witnesses to the last moment in a calculated effort to disadvantage AT&T Florida. Neither alternative is acceptable, and neither can form the basis for allowing dPi to belatedly file testimony.

12. Moreover, dPi is wrong to contend that AT&T Florida will not be prejudiced by the late filed testimony because AT&T Florida is generally aware of the topic raised in Mr. Tepera's testimony. dPi claims that "dPi and BellSouth are litigating this same issue in nearly all of the former BellSouth states." (Motion, p. 2). However, dPi neglects to mention that Mr. Tepera's testimony has not been filed in any of these states. Again, in North Carolina, dPi filed Mr. Tepera's affidavit on the same day that AT&T Florida filed its response to dPi's Motion. In Alabama, dPi filed the testimony of Mr. Bolinger, who referred in a summary fashion to the analysis performed by Mr. Tepera (*albeit*, without actually referring to it as having been performed by Mr. Tepera).[8] However, the comparatively more detailed testimony that Mr. Tepera has filed in this case has not been filed before in any proceeding, and AT&T Florida has not previously had the occasion to prepare rebuttal testimony to this testimony.

13. If dPi is allowed to file the testimonies of Mr. Tepera and Bolinger, then certainly AT&T Florida should be allowed to file Rebuttal Testimony. Allowing AT&T Florida to do so,

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[8] dPi also attached to Mr. Bolinger's testimony documents similar to those attached to Mr. Tepera's Testimony in this proceeding.

however, would not cure the prejudice from dPi's late filing. If dPi's late filing of testimony is allowed, then dPi would be free to prepare for the hearing, while AT&T Florida would be forced to spend the last few days before the hearing laboring to respond to dPi's belatedly filed testimony. Again, this burden would be shifted to AT&T Florida because dPi, for reasons that it makes no effort to explain in its Motion, elected to wait almost three months between the time it filed Mr. Tepera's analysis in North Carolina, and the time that it attempted to file his testimony containing the same analysis in Florida. Moreover, dPi has not only filed two sets of testimony, it has also filed 1,088 pages of exhibits to this testimony. AT&T Florida cannot simply assume that these exhibits are the same as dPi has filed in other states. Instead, AT&T Florida would have to undertake the time-consuming task of analyzing this information before it can complete any Rebuttal Testimony it might be allowed to file.

14. Finally, if dPi's Motion is granted, AT&T Florida will have no opportunity to propound written discovery on dPi regarding the matters set forth in the two sets of testimony, to depose Mr. Bolinger on his Supplemental Testimony, or to depose Mr. Tepera at all. AT&T Florida would be substantially prejudiced by being deprived of the same discovery rights that dPi has had in this proceeding, and has exercised vigorously. Further, given the above-described circumstances, one can only assume that this is precisely what dPi intended. It cannot be a coincidence that dPi moved for discovery to be reopened, then filed the subject testimonies only *after* this Motion was denied.

### E. Testimony Related To AT&T Florida's Response to RFI 1-19 Should Not Be Allowed For The Additional Reason That It Is Irrelevant.

15. The central issue in this case is whether dPi end users meet the criteria to receive the promotional waiver of the line connection charge. This promotion requires, in pertinent part,

the purchase of a 1FR *and* two or more features. Moreover, this retail promotion is made available for resale pursuant to the terms of the parties' Interconnection Agreement ("Agreement"), which states: "Where available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." (Interconnection Agreement, p. 40 of 1735, fn. 2).

16. As noted previously, in this case, there were no actual orders of features or blocks by dPi end users. Instead, dPi simply added blocks to customer lines, without customers' knowledge or consent, to attempt to generate discounts, which dPi kept (when it was successful), rather than passing the discounts on to its customers. This point is pertinent because it demonstrates that the testimony dPi seeks to file has no relevance in this proceeding.

17. How AT&T treats its own customers is evidence of how it interprets the LCCW promotion.[9] However, even if Ms. Tipton's testimony on this point were untrue, as dPi claims, dPi could still not prevail in this case. dPi's end users could not possibly have qualified for the promotion, because they did not *order anything*. In other words, since dPi routinely placed call blocks on its customer's lines without a request from the customer for these blocks (and without obtaining consent from the customer to do so or informing the customer that blocks had been placed) these blocks were not *ordered* by dPi's customers. Thus, the question of what AT&T does when a retail customer places an order for call blocks is never really reached, because none of dPi's customers ever placed orders for call blocks.[10]

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[9] Of course, the North Carolina Commission relied on this evidence, and it was entitled to do so.

[10] Moreover, when dPi did obtain the discount, it did not pass it on to its customers, but rather kept 100 percent of the waived charge for itself, which means that dPi also thwarted the intended result of the above-quoted language in the Interconnection Agreement, that the "promotion will be made available" to end users.

18. Given these facts, dPi has failed to qualify for the LCCW promotion under the clear language in the Interconnection Agreement, regardless of how AT&T handled its customers' orders of basic service and blocks, but no features. Accordingly, the testimony of Mr. Tepera is irrelevant.

19. Moreover, even if the question of how AT&T handled retail customer orders were at issue, the information that dPi seeks to admit through Mr. Tepera is, nevertheless, irrelevant because it simply does not show anything of probative value. dPi's request was to show how every retail order was processed that included basic service and call blocks. Since dPi requested information on *all* instances in which line connection charges were waived *for any reason*, an analysis of data produced in response to this request, by definition, can shed no light on the question of which, if any, customers received the waiver as a specific result of the application of the LCCW promotion.

20. The responsive information that AT&T provided showed that approximately 15 percent of the customers who ordered basic service and call blocks received a line connection charge waiver *for some reason.*[11] The information does not reveal, however, the reason for any of these waivers. Line connection charges can be waived not only as a result of the LCCW promotion, but also as a result of a customer's service being reconnected after a disconnection in error, a customer's service being restored after an outage due to a natural disaster, and for other reasons. Thus, the information that Mr. Tepera purports to have analyzed is irrelevant because it shows absolutely nothing as to *why* the line connection charge was waived in any given instance.

[11] Although dPi claims a different percentage of waivers were given, even dPi concedes that these waivers were given only in some cases.

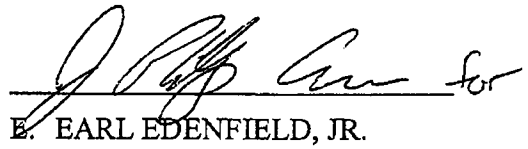
21. Under normal circumstances--that is, if testimony has been timely filed--the Commission might well deem it appropriate to admit potentially irrelevant testimony and then consider the weight to give it in light of its relevance *vel non*. That is, the Commission might decline to strike otherwise properly filed testimony even though questions as to its relevance exist. In this case, however, dPi is attempting to unjustifiably file testimony with voluminous exhibits that is months past any claim to timeliness, *and which is irrelevant as well.* If dPi is allowed to do this, then AT&T Florida will be placed in a position of having to review almost 1,100 pages of documents and then develop Rebuttal Testimony as best it can on the eve of hearing, all in order to respond to an "analysis" of discovery that is irrelevant on its face. Again, because dPi requested information on every instance in which line connection charges were waived for any reason, no analysis of this data can produce an answer to the question of whether any retail customer received the waiver as a specific result of the LCCW promotion. Given this, the lack of relevance of this information presents an additional reason that dPi's Motion should be denied.

## CONCLUSION

22. dPi's Motion should be denied for four reasons: First, both sets of testimony could have been filed months earlier than dPi chose to file them. dPi has failed completely to explain this delay. Second, dPi's inexplicable filing of the testimony in this fashion can only be viewed as an attempt to disadvantage AT&T Florida and is part of an ongoing course of improper conduct by dPi. Third, AT&T Florida will, in fact, suffer prejudice to its case if dPi's belated filing of this testimony is allowed. Fourth, the information dPi seeks to admit is based on discovery responses that are irrelevant to the real issue of whether dPi qualified for the LCCW promotion.

Respectfully submitted this 14th day of March, 2008.

AT&T FLORIDA



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