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Subject: Florida Docket No. 050863-TP
Importance: High
Attachments: response2.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. 13 pages total (includes letter, pleading and certificate of service)
- E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Motion for Reconsideration.

<<response2.pdf>>

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April 2, 2008

Ms. Ann Cole
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**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 Motion for Reconsideration, 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 2nd day of April, 2008 to the following:

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J. Phillip Carver

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: dPi Teleconnect, L.L.C. v.)
BellSouth Telecommunications, Inc.)

Docket No. 050863-TP

Filed: April 2, 2008

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO
MOTION FOR RECONSIDERATION**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") submits this Response in Opposition to dPi Teleconnect, L.L.C.'s ("dPi") Motion for Reconsideration ("Motion"). In response, AT&T Florida requests that the Florida Public Service Commission ("Commission") deny dPi's Motion. In support of this Response in Opposition, AT&T Florida states the following:

1. dPi's Motion seeks reconsideration of the Prehearing Officer's decision to deny dPi's Motion for Leave to File Supplemental Testimony and Additional Direct Testimony ("Motion for Leave").¹ For the reasons discussed below, dPi's Motion lacks merit, and dPi has failed to show valid grounds for reconsideration.

A. Background

2. On March 7, 2008, dPi filed its Motion for Leave. In its Motion for Leave, sought leave to supplement the direct and rebuttal testimony filed by dPi witness, Brian Bollinger - dPi's in-house attorney, and sought to file testimony of an entirely new witness, Steven Tepera - dPi's attorney. dPi asserted that the supplemental testimony and additional direct testimony centered "around late-produced evidence, is necessary for the Commission to render a just decision, and is not prejudicial to BellSouth."

¹ dPi in its Motion for Reconsideration does not mention the 11 pages of Brian Bollinger's Supplemental Testimony and thus, it does not appear to AT&T Florida that dPi is seeking reconsideration of the portion of pre-hearing officer's Order denying dPi leave to file Brian Bollinger's supplemental testimony. However, in an abundance of caution, AT&T Florida's Response in Opposition also addresses Mr. Bollinger's Supplemental Testimony as well as Mr. Tepera's Additional Direct Testimony.

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3. On March 28, 2008, the Prehearing Officer entered an Order denying dPi's Motion for Leave. *See* Order No. PSC-08-0209-PCO-TP. Specifically, the Prehearing Officer found that dPi failed to demonstrate why the supplemental testimony of Brian Bollinger and the additional direct testimony of Steven Tepera should be allowed less than three weeks prior to the hearing date of April 3, 2008 in light of the fact that dPi could have sought leave to supplement its testimony and add direct testimony as early as December 17, 2007, as evidenced by the filing of Steven Tepera's affidavit in the North Carolina. Moreover, the Prehearing Officer determined that allowing dPi to now supplement testimony would be prejudicial to AT&T Florida and that dPi's filings engendered continued delay of the resolution of the proceeding. Ultimately, the Prehearing Officer determined that dPi did not justify its request to file supplemental or additional direct testimony in light of the April 3, 2008 hearing date and denied dPi's requested relief.

4. In its Motion, dPi contends that the "Prehearing Officer has misconstrued the purpose of the testimony, has misapplied the rules so as to deny dPi of an opportunity to present its case, and has misconstrued the law and rules as to the effect of motion practice."

B. Commission's Standard of Review for Reconsideration of an Order

5. The Commission has recited the following standard for review on reconsideration:

The standard of review for reconsideration of a Commission Order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for

reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959); citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315, 317 (Fla. 1974).

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-06-1028-FOF-EU (Issued December 11, 2006). *See also, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 070001-EI, Order No. PSC-07-0330-FOF-EI, (Issued April 16, 2007) and *In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light*, Docket No. 000824-EI, Order No. PSC-01-2313-PCO-EI, (Issued November 26, 2001) (discussing standard of review for motion for reconsideration).

C. dPi Fails to Meet the Commission's Standard of Review

6. dPi fails to recite the Commission's standard of review for reconsideration of a Commission Order, or even discuss its application, in the Motion. This is perhaps unsurprising, because no points raised in the Motion come close to meeting the standard for reconsideration.

7. dPi presents nothing in the Motion² justifying reconsideration of the Prehearing Officer's denial of dPi's Motion for Leave. It does not even attempt to

² In essence, dPi's Motion is an unauthorized Reply to AT&T Florida's Response in Opposition to dPi's Motion for Leave, in that dPi has simply rehashed the same arguments it raised in its Motion for Leave. This is just another example of dPi's flagrant disregard of this Commission's Rules and Orders.

identify “a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order” Order No. PSC-06-1028-FOF-EU. To the contrary, the Motion simply argues points that should have been argued in the Motion for Leave or repeats the same arguments that were presented to the Prehearing Officer in dPi’s Motion for Leave. The Commission has expressly stated that these arguments are not a valid basis for reconsideration: “In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.” *Id.*

8. The Prehearing Officer reviewed dPi’s Motion for Leave and carefully evaluated and rejected the arguments that dPi makes in its Motion. dPi points to nothing that the Prehearing Officer overlooked or failed to consider in her evaluation. dPi is simply rehashing an argument that already has been considered and rejected. This cannot be a valid basis for reconsideration.

D. Order Denying dPi’s Requested Relief Was Within Prehearing Officer’s Authority

9. The Prehearing Officer was well within her discretion in denying dPi’s Motion for Leave, as “[t]he Prehearing Officer has broad authority to prevent delay.” *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-06-1028-FOF-EU (Issued December 11, 2006). In addition, the Prehearing Officer “may issue any orders necessary...to promote the just, speedy, and inexpensive determination of all aspects of the case”. Rule 28-106.211, Florida Administrative Code. The issuance of the Order that dPi is moving to be reconsidered was issued in order to prevent the delay of the hearing of this matter by the Commission. Presumably, if the Prehearing Officer had granted

dPi's Motion for Leave, the Prehearing Officer would have granted AT&T Florida an opportunity to 1) depose the witnesses on their new filed testimony, 2) serve written discovery, and 3) file rebuttal testimony to rebut Mr. Tepera's Additional Direct Testimony and Mr. Bollinger's Supplemental Testimony. Doing so, would have delayed this proceeding once again because of dPi's actions or omissions.

E. dPi Ignores The Other Grounds For The Denial of dPi's Motion By the Prehearing Officer

10. As indicated above, the Prehearing Officer found that dPi failed to demonstrate why the supplemental testimony of Brian Bollinger and the additional direct testimony of Steven Tepera should be allowed less than three weeks prior to the hearing date of April 3, 2008 in light of the fact that dPi could have sought leave to supplement its testimony and add direct testimony as early as December 17, 2007, as evidenced by the filing of Steven Tepera's affidavit in the North Carolina. Moreover, the Prehearing Officer determined that allowing dPi to now supplement testimony would be prejudicial to AT&T Florida. In her Order, determined that dPi did not justify its request to file supplemental or additional direct testimony in light of the April 3, 2008 hearing date and denied dPi's requested relief.

11. In its Motion, dPi attacks the Prehearing Officer's Order by contending it "appears to be denying the testimony because it is prejudicial to AT&T and because there have been numerous motions have been filed in this proceeding requiring '...an inordinate amount of the parties and the Commission's resources.' (Order PSC-08-0209 at 3), and thus presumably the testimony will somehow result in a delay in the proceedings." However, dPi ignores the Portion of the Prehearing Officer's Order, where she found as follows:

However, dPi fails to demonstrate why the requested testimony should be allowed less than three weeks prior to the current established hearing date. It appears that dPi could have sought leave to supplement its testimony as early as December 2007, as evidenced by the filing of an affidavit by Steven Tepera in North Carolina, regarding the discovery information served by AT&T in this Florida case. Consequently, it appears that dPi has had more than adequate time to review the discovery provided by AT&T and seek to supplement its previously filed testimony prior to March 7, 2008.

12. The above language is the crux of why the Prehearing Officer denied dPi's Motion for Leave and dPi makes absolutely no attempt to address why it did not file the testimonies prior to March 7, 2008, three weeks before the hearing date of April 3, 2008 either in its Motion for Leave or the Motion. dPi, by not addressing why it did not file the testimonies earlier, concedes it has no valid basis for delaying the filing and that it should have filed it earlier than March 7, 2008. If dPi had filed the testimonies in December 2007, January 2008, or even February 2008, AT&T Florida would have had an opportunity to respond. dPi has engaged in procedural gamesmanship by waiting till the last minute to file the testimonies. dPi either made a conscious decision to 1) delay the filing of the testimonies in a last-ditch attempt to delay the trial of this proceeding by the Commission or 2) hold back the testimony of these two witnesses till 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.

F. AT&T Florida Would Be "Unfairly" Prejudiced

13. Moreover, dPi is wrong to contend that AT&T Florida will not be "unfairly" prejudiced by the late filed testimony because AT&T Florida is aware of the topic addressed in the testimonies, it claims that it is AT&T's own data, the testimony was provided four weeks before the hearing, that AT&T has had dPi's analysis of the

data since December 2007, AT&T has already prepared a response to the analysis in North Carolina, and that AT&T has an unclean hands.

14. With regard to dPi's claims that AT&T Florida was aware of the topic addressed in the testimonies, that AT&T has had dPi's analysis of the testimony since December 2007 and that AT&T Florida has already prepared a response to the analysis, dPi neglects to mention that Mr. Tepera's testimony has not been filed in any of the states where it has filed affidavits. 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. Bollinger, 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).³ 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.

15. With regard to dPi's contention that AT&T Florida has unclean hands and that the testimony was provided four weeks before hearing, AT&T Florida unequivocally denies the allegation that it has unclean hands and that if any party has unclean hands it would be dPi for its failure to file a Request to File additional and supplemental testimony back in December 2007, when it initially filed Mr. Tepera's Affidavit in the North Carolina proceeding. Moreover, dPi's argument is, in essence, that because AT&T Florida allegedly provided information late to dPi, that dPi is allowed a "freebie" to now file something late. This argument is nonsensical. In addition, dPi's argument has no merit because AT&T Florida has acted properly in the timing of its responses to dPi's

³ dPi also attached to Mr. Bolinger's testimony documents similar to those attached to Mr. Tepera's Testimony in this proceeding.

discovery. Although his proceeding was filed in 2005, dPi did not file its first set of discovery until July 2007 and AT&T Florida timely served its responses to dPi's discovery on August 9, 2007. On September 13, 2007, dPi filed its Motion to Compel. On September 21, 2007, AT&T Florida received an email correspondence from Commission Staff that the prehearing officer had denied dPi's Motion to Compel in part and granted it in part and that AT&T Florida was directed to provide the requested information for the period of July 2005 through July 2007 by September 26, 2007. On September 26, 2007, only five days after being ordered to do so, AT&T Florida provided the information regarding RFI 1-19 for the required time period, as well as information from January 2005 to June 2005. This production required approximately 80 hours of labor by AT&T employees. 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. This production required approximately 145 hours of labor by AT&T employees and over 1200 hours of data processing time. dPi is dead wrong to say that AT&T Florida has unclean hands.

16. In addition, 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. However, if dPi's late filing of testimony is allowed at this late juncture, then AT&T Florida would have no opportunity to file rebuttal testimony. If it was prejudicial to AT&T Florida for dPi to file supplemental and direct testimonies as found by the Prehearing Officer last week, it would be even more prejudicial to AT&T Florida if dPi's Motion is granted at the hearing on April 3, 2008. Again, this burden would be shifted to AT&T Florida because dPi, for reasons that it makes no effort to explain in its Motions,

ected 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. If dPi's Motion is granted at the April 3, 2008 hearing, AT&T Florida would have no opportunity to file testimony on the date of the hearing.

G. dPi's Motion Is Another Improper Action In A Continuing Pattern of Improper Conduct

17. In isolation, dPi's unjustified attempts to file a Motion for Reconsideration and for Motion for Leave to file additional testimony on the eve of hearing would be objectionable. However, placed in the context of all that has occurred in this case, dPi's 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,⁴ and has twice filed Replies to AT&T Florida's Responses to dPi's Motions that are not authorized under the Commission's Rules.⁵ 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.⁶ Both Motions were denied.⁷ 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.⁸ This last action by dPi is especially telling.

⁴ dPi's Second Set of Requests for Information, dated November 11, 2007; dPi's Third Set of Requests for Information, dated December 27, 2007.

⁵ 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.

⁶ dPi's Motion for Continuance, dated July 20, 2007; dPi's Motion for Continuance, dated September 26, 2007.

⁷ 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).

⁸ dPi's Motion to Modify Procedural Schedule/Move Hearing Date, filed January 23, 2008.

18. 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 not 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 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.

H. Conclusion

19. dPi's Motion should be denied for five reasons: First, dPi fails to meet the Commission's standard for reconsideration. Second, the Prehearing Officer was well within her discretion and authority to deny dPi's requested relief. Third, both sets of testimony could have been filed months earlier than dPi chose to file them. dPi has failed completely to explain this delay. Fourth, 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. Fifth, AT&T Florida will, in fact, suffer "unfair" prejudice to its case if dPi's belated filing of this testimony is allowed.

WHEREFORE, based upon the foregoing, AT&T Florida respectfully requests that the Commission deny dPi's Motion for Reconsideration.

Respectfully submitted this 2nd day of April, 2008.

AT&T FLORIDA



E. Earl Edenfield, Jr.

Tracy W. Hatch

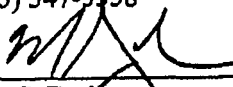
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