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DATE: March 18, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Christensen)
Division of Competitive Markets & Enforcement (Barrett) *PAC* *JK for MB* *DM* *DK*

RE: Docket No. 031125-TP – Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC.

AGENDA: 03/30/04 – Regular Agenda – Partial Motion to Dismiss - Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\031125.RCM.DOC

Case Background

On November 3, 2003, IDS filed its informal complaint against BellSouth for alleged overbilling (CATS file 567409-T). Commission staff sent a letter on December 16, 2003, closing out the complaint indicating the informal complaint process was not the appropriate forum in which to resolve this matter.

On December 19, 2003, BellSouth denied IDS access to “LENS.”¹ On December 23, 2003, IDS Telecom LLC (IDS) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for Overbilling and Discontinuance of Service and a Petition for Emergency Order Restoring Service. On December 24, 2003, BellSouth restored “LENS” access to IDS. On

¹ “LENS” is an acronym for Local Exchange Navigation System; “LENS” is a support platform that BellSouth developed for competitive local exchange carriers.

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December 30, 2003, IDS amended its Complaint (Amended Complaint) to consist of five counts upon which it requests relief. The five counts are:

- (1) Count One - BellSouth improperly disconnected LENS service to IDS in violation of Rule 25-22.032(6), Florida Administrative Code;
- (2) Count Two - BellSouth's action of disconnecting LENS service to IDS violates the current interconnection agreement;
- (3) Count Three - BellSouth's improper charges to the Q account (settlement account) and termination of LENS service violates the Parties' Settlement Agreement;
- (4) Count Four - BellSouth's actions regarding the disconnection of LENS violates the anticompetitive provision of Section 364.01, Florida Statutes; and
- (5) Count Five - BellSouth's actions regarding the disconnection of LENS violates the Telecommunications Act of 1996.

On December 31, 2003, Commission staff facilitated a conference call between the parties. As a result of the conference call, accounting teams from both Parties met face-to-face in Miami. Commission staff did not attend nor participate in this accounting meeting.

On January 9, 2004, BellSouth filed its Motion for Extension of Time to file its response to IDS' complaint. On January 16, 2004, BellSouth filed its Partial Motion to Dismiss and Answer regarding the Amended Complaint. On January 23, 2004, IDS filed its Unopposed Motion for Extension of Time which was granted by Order No. PSC-04-0184-PCO-TP, issued February 23, 2004. On February 6, 2004, IDS filed its response to BellSouth's Partial Motion to Dismiss and Answer.

Discussion of Issues

Issue 1: Should the Commission grant BellSouth Telecommunications, Inc.'s Partial Motion to Dismiss?

Recommendation: Staff recommends that BellSouth's Partial Motion to Dismiss IDS' Amended Complaint be granted. Specifically, staff recommends that Count Three (seeking relief for alleged violation of the Settlement Agreement) and Count Five (seeking relief for alleged violation of the Telecommunications Act of 1996) be dismissed for lack of subject matter jurisdiction. (CHRISTENSEN)

Staff Analysis: As noted in the Case Background, BellSouth filed its Partial Motion to Dismiss and Answer on January 16, 2004. On February 6, 2004, IDS filed its response to BellSouth's Partial Motion to Dismiss and Answer.

BellSouth's Motion to Dismiss

In support of its Motion, BellSouth states that in IDS' Amended Complaint, IDS asks this Commission to interpret the parties' current Interconnection Agreement (Current Agreement), the parties' settlement agreement (Settlement Agreement), and the parties' amended settlement agreement (Settlement Amendment). BellSouth contends that IDS' wants this Commission to find that (1) it violated the Settlement Agreement and the Present Agreement; and (2) its actions relating to the violation of the Settlement Agreement and Present Agreement also violate Florida and federal law. BellSouth asserts that this Commission does not have subject matter jurisdiction to do either.

BellSouth states that a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). BellSouth asserts that in disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true.² In determining the sufficiency of a complaint, the Commission should confine its consideration to the complaint and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958).

BellSouth states that, additionally, in order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). BellSouth asserts that that subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998).

² Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In the matter of Complaint and Petition of John Charles Heekin Against Florida Power & Light Company (citing to Varnes, 624 So.2d at 350).

BellSouth contends that this Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. See, e.g. Order No. PSC-01-2178-FOF-TP, issued November 6, 2001, in Docket No. 010345-TP, *In the Matter of Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Inc. for Structural Separation of BellSouth Telecommunications, Inc. into Two Distinct Wholesale and Retail Corporate Subsidiaries, (Order Granting Motion to Dismiss)*(granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation."); Order No. PSC-99-1054-FOF-EI (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved "a claim for monetary damages, an assertion of tortious liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.")

BellSouth asserts that this Commission, therefore, must determine whether the Legislature has granted it any authority to find that BellSouth is in violation of federal law or that BellSouth has violated a settlement agreement. BellSouth contends that in making these determinations, the Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. See *City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). BellSouth asserts that instead, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." See *Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977): *accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So. 2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statute," an agency "has no common law jurisdiction or inherent power")

BellSouth further contends that that any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See *Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N.R. Co.*, 49 So. 39 (Fla. 1909). BellSouth asserts that finally, ". . . any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977). BellSouth argues that IDS cannot demonstrate that the Commission has the authority to grant the specific relief IDS requests. Specifically, BellSouth claims that the Commission does not have subject matter jurisdiction over alleged violations of federal law. BellSouth asserts that a cursory review of Chapter 364, Florida Statutes, the Legislature has not granted the Commission any authority to determine whether a carrier has violated federal law. BellSouth contends that while the Commission has authority under the Act in Section 252 arbitration proceedings to interpret and resolve issues of federal law, including whether or not the arbitrated issues comply with Section 251 and FCC regulations prescribed pursuant to Section 251, the Act does not grant the Commission with any general authority to resolve and enforce purported violations of federal law. See, e.g., 47 U.S.C. §251.

BellSouth asserts that the Commission recently addressed this exact issue in Order No. PSC-03-1892-FOF-TP³, BellSouth contends that in the Sunrise Order, the Commission held that “[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes” and that “[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which that are created.” See Sunrise Order at p. 3 (citations omitted). BellSouth continues to cite the Sunrise Order for the proposition that the Commission, however, can construe and apply federal law “. . . in order to make sure [its] decision under state law does not conflict” with federal law. Id. at pp. 3-4. BellSouth asserts that accordingly, in the Sunrise Order, the Commission determined that it “. . . cannot provide a remedy (federal or state) for a violation of . . .” federal law, but can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. Id. at p. 5. BellSouth contends that the Commission noted that any “. . . [f]indings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction . . .” Id.

BellSouth contends that here, IDS is requesting that the Commission find, based on the same acts, that BellSouth violated Florida law as well as federal law. See Amended Complaint at pp. 12-13. BellSouth asserts that as set forth in the Sunrise Order, under Florida law, the Commission lacks jurisdiction to make such a finding. Accordingly, BellSouth requests that the Commission dismiss IDS’ Amended Complaint to the extent it seeks a finding that BellSouth has violated federal law.

Next, BellSouth claims that the Commission lacks subject matter jurisdiction to interpret and enforce a Settlement Agreement. BellSouth asserts that IDS nevertheless, requests that the Commission interpret the Settlement Agreement and Settlement Amendment and find that BellSouth is in violation of both. BellSouth acknowledges that the Commission does have authority under state and federal law to interpret and enforce agreements that it approves pursuant to the Act but contends that it is well-settled that the Commission does not have any authority to interpret and enforce general contracts. See Section 364.162, Florida Statutes (authorizing Commission to interpret and enforce agreements that it approves under state law); BST v. MCImetro Access Transmission Serv., 317 F. 3d 1270 (11th Cir. 2003) (finding the state commissions have the same authority under the Act); United Tel. Co. of Fla. v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986) (finding that the Commission did not have authority to modify rate contracts between telephone companies); and, Order No. PSC-95-0536-S-WS, issued April 28, 1995, in Docket No. 930256-WS, In Re: Petition for Limited Proceeding to Implement Water Conservation Plan in Seminole County by Sanlando Utilities Corporation (Sanlando Case), at p. 3 (finding that the Commission lacked authority to resolve certain disputes relating to a settlement and stipulation).

³ Order No. PSC-03-1892-FOF-TP, issued December 11, 2003, in Docket No. 030349-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth’s Alleged Use of Carrier-to-Carrier Information (Sunrise Order)

BellSouth asserts that the laws of Florida do not provide the Commission with jurisdiction to interpret and enforce a private, negotiated settlement agreement. BellSouth contends that it request that the Commission dismiss IDS' Amended Complaint to the extent it seeks a finding that BellSouth has breached the Settlement Agreement and/or the Settlement Amendment.

IDS' Response

IDS asserts that it properly petitioned the Commission for resolution of certain disputes arising from its interconnection agreements with BellSouth: (1) it disputed some of BellSouth's billings in good faith; (2) that the agreements prohibit BellSouth from discontinuing service to IDS for non-payment of disputed billing; (3) and that BellSouth nevertheless discontinued LENS service to IDS for non-payment of disputed billings. IDS contends that these allegations must be taken as true for purpose of reviewing BellSouth's Motion to Dismiss. Varnes v. Dawkins; and Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000).

IDS argues that this Commission has clear authority to resolve this dispute. IDS contends that it petitioned the Commission to interpret and enforce its interconnection agreement with BellSouth, and BellSouth admits that Section 364.162, Florida Statutes, provides the Commission with subject matter jurisdiction to do so. IDS asserts that this dispute is grounded on the parties' interconnection agreements and could not have arisen in their absence. IDS contends that because BellSouth's actions violate Florida and federal law, as well as the parties' Settlement Agreement, IDS has asked the Commission to make appropriate findings regarding such violations.

IDS states that BellSouth's argument that the Commission lacks subject matter jurisdiction to resolve and enforce alleged violations of federal law or interpret or enforce a settlement agreement, misstates IDS' claims. IDS claims that it is not seeking enforcement of federal law or its Settlement Agreement. To the contrary, IDS asks this Commission to interpret and enforce its interconnection agreements, and seeks only findings that BellSouth's actions violate federal law as well as the Settlement Agreement. IDS states that importantly, its Amended Complaint seeks no relief specific to such findings, but merely reiterates its request that the Commission resolve the interconnection dispute in its favor, order BellSouth to restore LENS service to IDS as required by the interconnection agreement, and prohibit BellSouth from similarly violating its agreements with IDS in the future. IDS contends that it is axiomatic that the Commission may consider such issues and make any findings that may be necessary to the resolution of any complaint lawfully placed before it. IDS states that BellSouth has cited no authority that prevents the Commission from considering the issues raised by IDS or making the findings it seeks.

IDS argues that BellSouth's reliance on Order No. PSC-03-1392-FOF-TP for dismissal of the complaint is entirely misplaced. IDS states that unlike the present case, where IDS asks the Commission to interpret and enforce an interconnection agreement, *Supra Telecommunications and Information Systems, Inc. (Supra)* specifically asked the Commission to enforce a federal statute. IDS acknowledges that the Commission found it was not authorized to take administrative action based solely on federal statutes, and as such could not provide a remedy for

a violation of 47 U.S.C. §222(b). IDS emphasizes however, that the Commission noted that it could interpret a federal provision and apply it to the facts of a case (to the extent necessary to ensure its findings and conclusions under state law do not conflict with federal law.) Order No. PSC-03-1392-FOF-TP at page 5

IDS asserts that in order to make the finding requested by IDS, the Commission need only interpret a federal provision and apply it to the facts of this case, as it has previously found it has the authority to do. IDS contends that unlike *Supra*, it has not asked the Commission to take administrative action based solely on federal statutes or to provide a specific remedy for violation of a federal statute. IDS states that it seeks, enforcement of its interconnection agreements with BellSouth, and the particular relief sought is specific to the terms of those agreements. IDS argues that the fact it asserts that BellSouth's actions also constitute violations of federal law does not remove this Commission's authority to review those actions.

IDS contends that BellSouth's argument regarding the Commission's alleged lack of authority over the parties' Settlement Agreement is overly broad and therefore flawed, for at least two reasons. IDS argues that first, the Settlement Agreement forms the basis for billing disputes under the Current Agreement. IDS states that BellSouth has declared that IDS' failure to make payments under the Settlement Agreement constitutes a breach of the Current Agreement, thus allegedly justifying BellSouth's discontinuance of LENS service. IDS asserts that on the other hand, it has raised good faith disputes regarding BellSouth's billing pursuant to the Settlement Agreement. IDS contends that the Commission therefore must review and interpret the Settlement Agreement in order to resolve Counts One, Two, and Four of IDS' Amended Complaint.

IDS states that second, the Current Agreement incorporates the Settlement Agreement and makes it clear that a failure to make payment of prior obligations – including those obligations embodied in the Settlement Agreement – will constitute a breach of the Current Agreement:

[T]his Agreement sets forth the entire understanding and except for Settlement Agreements that have been negotiated separate and apart from this Agreement, supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them. Any orders placed under prior agreements between the Parties shall be governed by the terms of this Agreement and IDS . . . acknowledges and agrees that *any and all amounts and obligations owed for services provisioned or orders placed under prior agreements between the Parties, related to the subject matter hereof, shall be due and owing under this Agreement and be governed by the terms and conditions of this Agreement as if such services or orders were provisioned or placed under this Agreement.* (emphasis in Response).

See, Section 31.1, General Terms and Conditions, Current Agreement. IDS argues that the Commission's review of the Settlement Agreement is an essential step in resolution of the instant interconnection dispute. IDS states that BellSouth can point to no case or statute that prohibits the Commission from reviewing and interpreting the Settlement Agreement. IDS acknowledges that if its Amended Complaint only alleged a breach of a Settlement Agreement, the Commission would lack subject matter jurisdiction over the complaint and even adds if BellSouth were only seeking to dismiss Count Three of the Amended Complaint, IDS might agree with BellSouth's position. IDS emphasizes, however, that BellSouth has not directed its argument specifically to Count Three of the Amended Complaint, but instead attempts to prevent the Commission from any consideration of the Settlement Agreement.

Finally, IDS asserts that BellSouth's Motion is deficient in that it has not specified exactly what portion of IDS's Amended Complaint it seeks to dismiss. IDS states that its Amend Complaint details five separate counts against BellSouth, yet BellSouth failed to identify any of them in its Motion. IDS argues that it appears that BellSouth is improperly attempting to bar from this proceeding any evidence and argument relating to the Settlement Agreement or federal law. IDS asserts that this is an improper purpose for a Motion to Dismiss, and thus, BellSouth's Motion should be denied.

Analysis

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

IDS's complaint sets forth five counts on which it is requesting relief. The essence of the disputes involves whether monies paid or not paid to an account especially established under a settlement agreement justified disconnection proceedings under the current interconnection agreement. In Count One, IDS requests that the Commission find BellSouth's actions in violation of Rule 25-032(6), Florida Statutes. IDS requests relief in Count Two based on BellSouth's alleged violation of its current interconnection which was approved by this Commission. In Count Three, IDS seeks a finding that BellSouth violated its Settlement Agreement. Count Four requests relief based on BellSouth's alleged anticompetitive behavior in violation of Chapter 364, Florida Statutes. Finally, Count Five seeks relief based on BellSouth's alleged anticompetitive behavior in violation of the Telecommunications Act of 1996.

Staff believes BellSouth's argument is without merit to the extent that argument is that IDS's complaint fails to state a cause of action merely because the Complaint requires the

Commission to refer to a privately negotiated settlement agreement and federal law to settle the dispute. In the Sunrise Order, this Commission found that

In order to ensure that our decision under state law does not conflict with the federal provision, we may interpret the federal provision and apply it to the facts of this case. Findings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction to hear and remedy complaints regarding violations of Section 222 of the Act.

Order No. 03-1392-FOF-TP at p. 5. That analysis is equally applicable here. Thus, the fact that a count of this Complaint asks the Commission to interpret and apply federal law is not in and of itself reason to dismiss those portion of the complaint.

However, the Commission also noted in the Sunrise Order that it has never asserted jurisdiction to enforce an alleged violation of the Act in any situation in which the Commission did not also have state law authority for doing so. Id. at 4-5. In addition, the Commission found that state agencies, as well as federal agencies, are only empowered by the statutes pursuant to which those agencies were created. Id. (citing Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986); Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1254-1255 (Fla. 1990); Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1082 (Fla. 1st DCA 1995). The Commission acknowledged that federal courts have found that a state agency is not authorized to take administrative action based solely on federal statutes. Id. at 3 (citing Curtis v. Taylor, 648 F. 2s 946 (5th Cir. 1989)). Since Count Five relies solely on a federal statute as the basis for relief, staff believes it is appropriate to dismiss Count Five.

Similarly, staff believes it is appropriate to dismiss Count Three. Even IDS acknowledged in its response that Count Three would be appropriately dismissed if its Amended Complaint had only alleged a breach of a Settlement Agreement (not approved by the Commission).⁴ Staff agrees that the Commission in this instance is not the appropriate forum to enforce this non-commission approved Settlement Agreement. In the Sanlando Case, the Commission noted that in a typical contract dispute a party may always seek to enforce a provision or remedy a breach of contract in court. Order No. PSC-95-0536-S-WS at p. 4. Staff notes that a settlement agreement is in essence a contract. Since Count Three solely relies the Settlement Agreement as the basis for resolving the dispute in IDS's favor, staff also believe it is appropriate to dismiss Count Three. Dismissal of Count Three, however, does prevent the Commission from considering the Settlement Agreement as evidence in the current dispute.

⁴ In its Complaint, IDS notes that the Settlement Agreement was reached as a resolution to Docket No. 010740-TP. By Order No. PSC-01-2191-FOF-TP, issued November 8, 2001, this Commission acknowledged the withdrawal of the Complaint and closed the docket. Staff notes that this Commission did not issue any order approving the Settlement Agreement.

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Staff notes that even with the dismissal of Counts Three and Five, IDS has alleged three other counts which rely on other provisions of state and federal law under which this Commission has jurisdiction to proceed. Specifically, the allegations raised in Count Three appear to be addressed in Count Two and the allegations raised in Count Five are addressed in Count Four.

Thus, staff recommends that BellSouth's Partial Motion to Dismiss IDS' Amended Complaint be granted. Specifically, staff recommends that Counts Three and Five be dismissed for lack of subject matter jurisdiction.

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Issue 2: Should this docket be closed?

Recommendation: No, this docket should remain open pending further proceedings.
(CHRISTENSEN)

Staff Analysis: If the Commission approves staff's recommendation, this matter should be set for an administrative hearing. Thus, this docket should remain open pending further proceedings.