

State of Florida



Public Service Commission

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COMMISSION
CLERK

DATE: May 20, 2004

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

FROM: Office of the General Counsel (Christensen) PAC *pk*
Division of Competitive Markets & Enforcement (Barrett) MCB *[Signature]*

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: 06/01/04 – Regular Agenda – Motion for Leave to Amend Answer to Assert Counterclaim - 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 December 30, 2003, IDS amended its Complaint (Amended Complaint) to consist of five counts upon which it requests relief.

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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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 16, 2004, BellSouth filed its Partial Motion to Dismiss and Answer regarding the Amended Complaint. On February 6, 2004, IDS filed its response to BellSouth's Partial Motion to Dismiss and Answer. By Order No. PSC-04-0423-FOF-TP, issued April 26, 2004, BellSouth's Partial Motion to Dismiss part of IDS's Amended Complaint was granted. Specifically, 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) were dismissed for lack of subject matter jurisdiction.

By Order No. PSC-04-0472-PCO-TP, issued May 6, 2004 (Order Establishing Procedure), the procedure was established for this proceeding and the hearing date was scheduled for October 14, 2004. Also in that Order, the tentative issues to be addressed in this proceeding were identified.

On May 7, 2004, BellSouth filed its Motion for Leave to Amend Answer to Assert Counterclaim along with its Counterclaim. In its Counterclaim, BellSouth identifies four counter claims: (1) daily usage file dispute; (2) market-based rate dispute; (3) request for escrow/immediate payment; and (4) request for deposit. On May 14, 2004, IDS filed its Response and Opposition to BellSouth's Motion. This recommendation addresses BellSouth's Motion and IDS's Response.

Discussion of Issues

Issue 1: Should the Commission grant BellSouth's Motion for Leave to Amend Answer to Assert Counterclaim?

Recommendation: Yes, staff recommends that BellSouth be granted Leave to Amend its Answer in part. Specifically, BellSouth should be allowed to proceed on Counts I (DUF charges) and II (Market-based Rates) of its Counterclaim. BellSouth should not be allowed to Amend its Answer to include Counts III (Escrow account) and IV (Deposit) of its Counterclaim. (CHRISTENSEN)

Staff Analysis: As noted in the Case Background, BellSouth filed its Motion for Leave to Amend Answer to Assert Counterclaim on May 7, 2004. On May 14, 2004, IDS filed its response in opposition to BellSouth's Motion.

BELLSOUTH'S MOTION

In support of its Motion, BellSouth states that based on its review of IDS's Amended Complaint, the claims asserted, the relief requested, and the attached exhibits, including Exhibit F to Amended Complaint, BellSouth believed that IDS was seeking resolution by the Commission of all the parties' current billing disputes. Thus, BellSouth did not submit a Counterclaim raising any specific billing dispute issues.

BellSouth asserts that on March 15, 2004, it issued discovery to IDS. BellSouth contends that on April 15, 2004, IDS responded to this discovery and, for the first time, expressly stated that it was only seeking the resolution of a single billing dispute – the Special Q Account – in its Amended Complaint. Therefore, BellSouth is now seeking to include the other billing dispute issues in this proceeding.

BellSouth cites to Rule 1.190(e) of the Florida Rules of Civil Procedure regarding the amendment of pleading. Rule 1.190(e) states that:

At any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

BellSouth claims that given the Commission's limited hearing schedule, justice requires that its Counterclaim be resolved within the instant proceeding to promote judicial efficiency, minimize the cost and expense in litigating the disputes asserted by IDS, and minimize the delay in BellSouth's receipt of the amounts set forth therein. BellSouth asserts that litigating two proceedings on separate tracks involving the same parties is neither economical nor efficient. BellSouth contends that because the original Complaint is limited to a single issue – a dispute related to a special Q account – the resolution of the disputes in the instant docket will not

unnecessarily delay the original proceeding. BellSouth contends that it was not until IDS responded to BellSouth's discovery that IDS disclosed that the only dispute it wished to resolve in its Complaint was the special Q account dispute. BellSouth suggests that this is not surprising in light of the fact that IDS takes the position that as long as billing disputes are outstanding, BellSouth is prohibited from terminating IDS's service for nonpayment. See Amended Complaint at ¶ 21. BellSouth claims that if it had previously known IDS's position was its complaint raised only those billing disputes regarding the Q account, it would have filed the instant Counterclaim with its Answer. BellSouth asserts that since filing its answer, it has also become clear that the parties will be unable to resolve its request that IDS provide it with a deposit.

BellSouth states that given IDS's recent disclosure of its intentions to limit the parameters of its Complaint and the parties' ongoing settlement discussions, BellSouth filed this Counterclaim as expeditiously as possible. BellSouth claims that no party will be prejudiced by consideration of its Counterclaim in this docket. BellSouth notes that IDS objects to its motion.

IDS'S RESPONSE

In its Response, IDS asserts that its general allegations are based on the following facts. IDS claims that on May 11, 2001, it filed a complaint against BellSouth with this Commission in Docket No. 010740-TP. IDS states that on or about September 27, 2001, BellSouth and IDS settled Docket No. 010740 and two other litigations by way of a settlement agreement, which was later amended on or about March 25, 2002. IDS asserts that although it made all payments due under the settlement agreement, as amended, BellSouth attempted to change the settlement and unilaterally insisted on it making additional payments beyond those previously agreed. IDS contends that when it disputed these additional charges and refused to pay BellSouth, BellSouth unilaterally declared these disputed amounts "undisputed" and terminated its access to LENS. IDS claims that neither the petition nor amended petition allege any other disputes for resolution in this docket.

IDS asserts that on January 16, 2004, BellSouth filed its Partial Motion to Dismiss and Answer seeking to dismiss portions of the petition for lack of subject matter jurisdiction to interpret federal law and the parties' settlement agreement. IDS claims that BellSouth's Partial Motion to Dismiss and Answer did not imply or otherwise contend that any other disputes were at issue in the docket, other than BellSouth's disconnection of LENS and its over-billing of the settlement agreement special account.

IDS states that, pursuant to the Order Establishing Procedure, the deadline for filing direct testimony is July 22, 2004, and October 14, 2004, is when the one day evidentiary hearing will be held. IDS asserts that this schedule was set based upon the limited number of issues originally presented in IDS's amended petition.

IDS disputes BellSouth's claim that it believed this docket contained numerous other billing disputes that are simply not alleged in the petition or amended petition. IDS agrees that prior to BellSouth taking unilateral action to deny access to LENS, BellSouth had specifically been advised that the settlement account was in dispute because IDS had included the issue in a November 2003 letter to Commission staff. IDS asserts that the purpose of this reference was

simply to show that BellSouth had ignored the parties' interconnection agreement pursuant to which BellSouth is precluded from denying service for failure to pay disputed amounts. IDS claims that in fact, despite clearly knowing that the settlement account overcharges were in dispute, BellSouth continued asserting its "one-sided" mantra that the charges were undisputed. IDS asserts that the reference to the prior letter requesting an informal resolution was clearly made to demonstrate the frivolous position taken by BellSouth prior to denying IDS services.

IDS contends that BellSouth now claims in the Motion that IDS reference to the November 2003 informal dispute resolution letter, somehow caused BellSouth to believe that this docket included many more disputes than the settlement account issue. IDS states that despite such a statement, BellSouth's proposed counterclaim only includes two of the eight issues in the November 2003 informal dispute resolution letter, plus a new issue (a BellSouth deposit request) that was not part of the informal dispute resolution letter. IDS contends that given the clear language of the petition and amended petition, and BellSouth's obvious attempt to simply pick and choose old and new "disputes" in its proposed counterclaim, BellSouth's explanation for why it waited this long to seek the inclusion of the issues in its proposed counterclaim is simply not credible.

IDS states that BellSouth cites to Rule 28-106.204 as the rule authorizing this motion. However, IDS contends that the applicable rules of administrative procedure do not provide for the filing of counterclaims in a docket such as this. IDS asserts that Chapter 28-106, Florida Administrative Code (Decisions Determining Substantial Interests) sets forth the applicable procedural rules. IDS asserts that Chapter 25-40 of the Florida Administrative Code, identifies this Commission's exceptions to the Uniform Rules of Procedure, with those exceptions being found in Chapter 25-22 of the Florida Administrative Code (entitled Rules Governing Practice and Procedure). IDS concludes that nothing in any of those rules authorizes the filing of counterclaims.

IDS asserts that Rule 28-106.201, Florida Administrative Code, cover petitions and the filing of petitions, and Rule 28-106.202, Florida Administrative Code, allows for an amendment to petitions. IDS acknowledges that a petition may be amended by right before the designation of a presiding officer or with leave of the presiding officer after such designation, but IDS asserts that BellSouth is not seeking to amend a petition but rather an answer. IDS contends that unlike the Rules of Civil Procedure which require an answer, Rule 28-106.206, Florida Administrative Code, permits, but does not require, a respondent to file an answer. IDS asserts that BellSouth's reliance on Rule 1.190, Florida Rules of Civil Procedure, is misplaced because the only reference to the Florida Rules of Civil Procedure is in Rule 28.106-206, Florida Administrative Code, which refers to specific discovery rules in the Florida Rules of Civil Procedure.

IDS states that even if Rule 1.190, Florida Rules of Civil Procedure, applied to this proceeding, the applicable case law interpreting that rule states that amendments to a pleading should be allowed only if the opposing party will not be prejudiced. See, Johnson & Bailey Architects, P.C. v. Southeast Brake Corp., 517 So.2d 776, 777 (Fla. 2d DCA 1988); see, e.g. Emig v. State of Florida, Dept. of Health and Rehabilitative Services, 456 So. 2d 1204, 1208 (Fla. 1st DCA 1984); and Albright v. Mercer, 411 So. 2d 991 (Fla. 4th DCA 1982). IDS claims that in this situation and for numerous reasons, it will be prejudiced by the inclusion of BellSouth's counterclaim.

First, IDS asserts that BellSouth did not file the Motion until after the issue identification conference and after the Prehearing Officer entered his Order Established Procedure requiring direct testimonies to be filed by July 22, 2004, and setting this matter for a one day evidentiary hearing on October 14, 2004. IDS contends that the scope of this docket went from one issue to three issues multiplying the scope of this docket four times. IDS contends that the current schedule is too tight for the litigation of four separate disputes, and it is simply not possible to conduct an evidentiary hearing on all four disputes in one day. IDS asserts that the parties will need at least two to three days for hearing; thus, unless the current schedule is modified, IDS will clearly suffer prejudice by allowing the inclusion of any such new issues.

IDS contends that, second, two of the issues BellSouth seeks to introduce involve issues common to all CLECs. IDS asserts that one pertains to is BellSouth's refusal to true-up the interim DUF rates to the final Florida rates set in the UNE dockets. IDS claims that this issue is at the crux of BellSouth's Count I of its proposed counterclaim. IDS asserts that in each of BellSouth's Section 271 proceedings, including in Florida, the FCC clearly and repeatedly stated that as part of the granting of long distance approval, BellSouth was obligated to have mechanisms to true-up interim rates to final rates, and that BellSouth was obligated to true-up interim rates to final rates. IDS asserts that one of the mechanisms referred to by the FCC was the standard true-up language that can be found in most (if not all) interconnection agreements during the relevant time period (i.e. 1999 through 2000). IDS contends a large part of the DUF dispute involves BellSouth's refusal to true-up DUF rates and to insist on forcing CLECs to pay the higher interim rates prior to the setting of final rates. IDS asserts that this is an issue which specifically affects most, if not all, CLECs, and thus would be better litigated in a generic proceeding wherein all CLECs have the right to comment.

IDS asserts that the second set of issues of common interest include BellSouth's insistence on billing all CLECs the "market-based" rates for local switching on the first three DSO UNE-P combinations, where an end-user has four or more lines. IDS states that there also exist questions regarding BellSouth's inability to provide DSO EELs during the relevant time period, and whether 271 pricing would be implicated after BellSouth received such approvals. IDS claims these are all issues at the crux of Count II of BellSouth's proposed counterclaim, and each one of them concerns all CLECs in Florida. IDS states that in order to address these issues, this Commission must interpret a variety of prior FCC opinions and rules that apply to all CLECs in this state. IDS contends that like the DUF issue, these issues would be better litigated in a generic proceeding wherein all CLECs have the right to comment.

IDS contends that on both the DUF and Market Based Rate issues (Counts I and II of its proposed counterclaim), BellSouth is seeking to litigate issues common to all Florida CLECs, against one small CLEC (IDS) who does not have the ability and resources to properly address these issues as would the entire CLEC community. IDS states that if successful, BellSouth will then likely use the results against all other CLECs as binding precedent, effectively denying all other Florida CLECs a reasonable opportunity to litigate these issues before the Commission. IDS asserts that it will also be prejudiced by not having the assistance of all other CLECs who might weigh-in on these far reaching issues, which go well beyond a simple billing dispute between IDS and BellSouth.

IDS asserts that the last new issue BellSouth seeks to introduce into this docket involves a BellSouth request for a deposit from IDS. IDS contends that this issue was never even addressed in the November 2003 letter informal dispute resolution, and BellSouth only began demanding a deposit after IDS sent that November 2003 letter to this Commission. IDS claims that BellSouth has not and cannot give any true justification for waiting so long to attempt to bring this issue into this docket. IDS asserts that, moreover, the interconnection agreement contemplates a separate proceeding on this issue with the parties seeking an expedited resolution within sixty (60) days of the filing of such petition. IDS states, indeed, BellSouth has already indicated that it may take unilateral action under the interconnection agreement to terminate service to IDS if this Commission does not resolve the deposit issue within sixty (60) days.

IDS contends that BellSouth is abusing the system because BellSouth already knew when it filed its Motion, that this docket was not scheduled to conclude within sixty (60) days. IDS asserts that it would not be possible to keep such a schedule with the current issues already in this docket. IDS asserts that BellSouth's request, if granted, will be extremely prejudicial to IDS because it would quadruple the scope of this docket, while at the same time threatening to take unilateral action to shut off service to IDS, unless this docket is concluded with sixty days after allowance of its counterclaim (i.e. approximately August 2004).

IDS asserts that none of BellSouth's proposed counterclaims would even remotely be considered compulsory in a court proceeding. IDS notes that even BellSouth admits that its counterclaim raises issues that are new and distinct from those issues raised in IDS' petition and amended petition. IDS states that, moreover, there are good reasons to conduct the issues raised in BellSouth's proposed Count I (DUF) and Count II (Market-Based Rates) in generic proceedings open to all CLECs in this state. Finally, IDS contends that including the deposit issue in this proceeding will only cause severe prejudice to IDS and is simply unfair. Thus, IDS contends that for the reasons stated above that BellSouth's Motion For Leave to Amend Answer to Assert Counterclaim be denied.

ANALYSIS

Rule 28-106.203, Florida Administrative Code, allows a respondent to file an answer to a petition, but does not require an answer. The Uniform Rules of Procedure in the Florida Administrative Code, contain no provision for counterclaims equivalent to that provided for under Rule 1.170, Florida Rules of Civil Procedure. However, the Uniform Rules allow a petition to be amended at the discretion of the presiding officer. See, Rule 28-106.202, Florida Administrative Code. Further, Rule 28-106.108, Florida Administrative Code, permits consolidation of

. . . separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

Staff believes that even though there is no specific rule which addresses the right of a party to file a counterclaim, the standard for allowing consolidation of separate matters is the appropriate

standard to be applied. Further, it appears that the Uniform Rules grant presiding officers latitude and discretion regarding the scope of the proceedings before them. Thus, staff believes that the Commission may at its discretion permit any or all of BellSouth's counterclaims to become part of this proceeding. Staff will address the merits of allowing BellSouth's specific Counterclaim counts to become part of the proceeding below.

A. Counterclaim Count I

In Counterclaim Count I, BellSouth alleges that IDS has failed to pay for Daily Usage File (DUF) charges for services received in Florida that IDS disputed. In its Counterclaim Count I, BellSouth asserts IDS inappropriately disputes the DUF charges. IDS claims that this count should not be included in this proceeding because DUF charges are applicable to all CLECs and would be best addressed in a generic proceeding. Further, IDS claims it would be unduly prejudiced if this issue was allowed to be included in this proceeding.

Staff believes that the amount alleged in BellSouth's Counterclaim Count I is related to the dispute between the parties regarding the amount owed by IDS regarding the Q account. To the extent that this count relates to the initial complaint raised by IDS, staff believes that it is appropriate to include the count in the proceeding. Staff is not persuaded that resolution of this matter need wait for a generic proceeding. Thus, staff recommends that BellSouth be granted Leave to Amend its Answer to include Counterclaim Count I.

B. Counterclaim Count II

BellSouth alleges in this Counterclaim that IDS failed to pay the appropriate market-based rates for 4 or more DS0 lines in the applicable MSAs. BellSouth asserts that IDS failed to pay any charges associated with this dispute, including undisputed charges. IDS counters that this count is inappropriate for this proceeding because it affects all CLECs and would be best addressed in a generic proceeding. IDS again claims that it would be prejudiced if this count was allowed to be included in this proceeding.

Staff believes that this issue relates to the amount BellSouth claims it was owed in the Q account. Since this is related to the initial complaint regarding whether BellSouth rightfully disconnected LENS, staff believes that this count should also be included in this proceeding. Staff recognizes that any decision in this docket may have application to other CLECs. However, staff does not believe that merely because a decision has application beyond the instant case that that fact precludes the parties from resolving the matter between themselves. Consequently, staff does not believe that these parties in this particular case need wait for a generic proceeding to be established in order to resolve this issue. Thus, staff recommends that BellSouth be granted Leave to Amend its Answer to include Counterclaim Count II.

C. Counterclaim Count III

BellSouth asks the Commission to require IDS to immediately pay any undisputed amounts and pay any disputed amounts into an escrow account until the resolution of the proceeding. BellSouth provides an amount it believes should be in that escrow account. IDS does not address this count in its response. However, staff believes that this count should not be

allowed to proceed. First, this Count seeks a remedy before the Commission makes a determination whether or not there are any undisputed amounts. Second, staff believes the issue is already addressed in Issue 4 of the Tentative Issues list which states:

When should any credit or payment be submitted?

Finally, BellSouth does not cite any reference to the interconnection agreement which would require disputed amounts to be placed in an escrow account until the conclusion of the dispute. Thus, staff recommends that BellSouth be denied Leave to Amend its Answer to include Counterclaim Count III.

D. Counterclaim Count IV

BellSouth's final counterclaim concerns the dispute over whether IDS should be required to pay a deposit. BellSouth claims that IDS should be required to provide a security deposit. BellSouth asserts that if IDS fails to provide the security deposit in the amount specified by BellSouth within sixty (60) days of filing the counterclaim with the Commission, under the interconnection agreement BellSouth can terminate service if the dispute is not resolved.

IDS complains that this count is inappropriate for this proceeding because BellSouth is very aware of the current schedule for this docket (the hearing is set for October 14, 2004), and BellSouth chose to file knowing the matter will not be decided before the sixty (60) day deadline required in the interconnection agreement. IDS asserts that it would be extremely prejudiced if BellSouth were allowed to expand this docket on all counts and yet require the process to be concluded within sixty (60) days or terminate service to IDS.

Staff agrees with IDS that permitting this count in this proceeding would create extreme prejudice to IDS. BellSouth should have been aware that the deposit dispute would not be resolved within sixty (60) days of filing its counterclaim with the Commission, thereby creating a "Catch 22" situation for IDS. Staff believes that if BellSouth wished to seek resolution of the deposit dispute, it should have filed a complaint requesting expedited treatment noting the sixty (60) day deadline. Further, staff notes that this issue arises because of the billing dispute but is not part of the original billing dispute. In fact, BellSouth in its Counterclaim states that its sent its request for a deposit on December 9, 2003. BellSouth disconnected LENS on December 19, 2003, before receiving IDS's response to its deposit request letter on December 22, 2003. Therefore, staff believes that the deposit issue is beyond the scope of the initial complaint. Thus, staff recommends that BellSouth be denied Leave to amend its Answer to include Counterclaim Count IV.

CONCLUSION

Staff is not persuaded that IDS would be prejudiced merely because the schedule has been set if part of the Counterclaims are allowed to proceed. Currently, there is approximately one and a half months before direct testimony is due and five months before hearing. While staff believes that the addition of the two counterclaims should not unduly burden the parties under the current schedule, staff notes that the Commission has flexibility to address any legitimate workload concerns regarding the schedule in the future.

Docket No. 031125-TP

Date: May 20, 2004

In conclusion, staff recommends that BellSouth be granted Leave to Amend its Answer in part. Specifically, BellSouth should be allowed to proceed on Counts I (DUF charges) and II (Market-based Rates) of its Counterclaim. BellSouth should not be allowed to Amend its Answer to include Counts III (Escrow account) and IV (Deposit) of its Counterclaim.

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Docket No. 031125-TP

Date: May 20, 2004

Issue 2: Should this docket be closed?

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

Staff Analysis: This matter is set for an administrative hearing. Regardless of whether the Commission approves or denies staff's recommendation on Issue 1, this matter will still require resolution in an administrative hearing. Thus, this docket should remain open pending further proceedings.