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## -M-E-M-O-R-A-N-D-U-M-

**DATE:** August 5, 2004

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

**FROM:** Office of the General Counsel (Christensen) PAC
Division of Competitive Markets & Enforcement (Barrett, Lee) MCB

**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:** 08/17/04 – Regular Agenda – Motion for Reconsideration of Prehearing Officer's Order- Oral Argument Not Requested: Oral Argument May However Be Entertained at the Commission's Discretion Pursuant to Rule 25-22.0376, F.A.C.

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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

## Case Background

On December 30, 2003, IDS amended its Complaint (Amended Complaint) consisting of five counts upon which it requested relief. 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. 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. By Order No. PSC-04-0625-PCO-TP, issued June 25, 2004, the Order Establishing Procedure was modified to reschedule to earlier dates the hearing, prehearing, and key activities dates. Currently, the hearing is scheduled for September 10, 2004 and the prehearing conference is scheduled for August 30, 2004.

On June 4, 2004, BellSouth filed its Motion to Compel IDS to respond to its First Set of Interrogatories and Requests for Production of Documents. The parties had reached agreement that IDS would produce supplemental responses by May 20, 2004, for all discovery except

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Interrogatories Nos. 14 and 22. When IDS failed to produce the supplemental discovery by that date, BellSouth filed its Motion to Compel. However, IDS did produce supplemental responses to BellSouth's discovery on June 9, 2004. Thereafter, on June 11, 2004, IDS filed its Response to the Motion to Compel and noted in that it had provided supplemental responses. In Order No. PSC-04-0635-PCO-TP, issued July 1, 2004, the Prehearing Officer determined that since IDS had provided supplemental responses to all the outstanding discovery except for Interrogatory No. 22, BellSouth's Motion to Compel appeared to be moot, except as it related to Interrogatory No. 22.

On July 12, 2004, BellSouth filed its Motion for Reconsideration of Order No. PSC-04-0635-PCO-TP. BellSouth seeks reconsideration because it believes that the Prehearing Officer failed to consider the adequacy of IDS's supplemental responses. On July 19, 2004, IDS filed its Response and Opposition to BellSouth's Motion for Reconsideration. This recommendation addresses BellSouth's Motion for Reconsideration and IDS's Response.

## Discussion of Issues

**Issue 1**: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion for Reconsideration of Order No. PSC-04-0635-PCO-TP.

**Recommendation**: No, staff recommends that the Commission deny BellSouth's Motion for Reconsideration of Order No. PSC-04-0635-PCO-TP, issued July 1, 2004. (CHRISTENSEN)

**Staff Analysis**:

BellSouth's Motion

BellSouth contends that this Commission should reconsider the Prehearing Officer's decision as it relates to Interrogatories Nos. 23 and 24 and Request for Production No. 1, because IDS's supplemental responses were evasive and incomplete as to these requests and thus were not rendered moot as a result of IDS's supplemental responses. BellSouth argues that because IDS failed to even provide the Commission with a copy of its supplemental responses, the Commission was precluded from making such an evaluation. Essentially, BellSouth argues that IDS's discovery responses that merely reference the court file in the circuit court matter are insufficient, especially in regards to the depositions taken in that matter. BellSouth further contends that it would have provided the information regarding the insufficiency of IDS's responses prior to the Commission's Order, but reply briefs or memoranda are prohibited by Commission rules. BellSouth asserts that the Commission should require IDS to immediately (1) identify all pleadings, depositions, and discovery responses that relate to the Civil Proceeding; and (2) produce said pleadings, depositions, and discovery.

IDS's Response

IDS argues that, in its initial response to BellSouth's discovery, it responded truthfully when it initially stated there where no lawsuits pending that involve the same issues being litigated in this docket. IDS contends that, based on further discussion with BellSouth, it agreed to provide the information. IDS states that it provided the circuit court citation and referred BellSouth to the Miami-Dade County Clerk Court website, which contained a docket of the case. IDS states that it also agreed to make some other revisions and provide BellSouth copies of the documents it intended to produce. IDS claims that because it did not finish its revisions and document production within the time period sought by BellSouth, BellSouth filed its Motion to Compel.

IDS contends that BellSouth has failed to meet the reconsideration standard. IDS states that it appropriately responded to both Interrogatories Nos. 23 and 24 by identifying the court case and the website for the docket information. Next, IDS responds to BellSouth's complaint that it should have provide copies of such "pleadings, depositions and discovery responses (if any)." IDS contends that the attachment to BellSouth's motion demonstrates that it has already obtained copies from the court file. Moreover, BellSouth has easy access to the court file. IDS also states that it cannot produce the referenced deposition because it does not have a copy and that BellSouth can obtain a copy from the court reporter. IDS asserts that further, the only

production made by IDS in the circuit court case was recently and after BellSouth had filed its Motion to Compel. IDS asserts that the documents produced in that circuit court case are the same documents produced earlier to BellSouth in this docket, together with copies of pleadings filed in this docket. IDS contends that BellSouth should already have a copy of every document IDS produced in that circuit court case.

IDS asserts that, pursuant to Florida Rule of Civil Procedure 1.350(b), it is only obligated to produce the documents where they are kept in the ordinary and regular course of business. See Evangelos v. Dachiel, 553 So.2d 245 (Fla. 3rd DCA 1989)(documents need only be produced where and as they are kept in the ordinary course of business). IDS concludes that although BellSouth most likely has a copy of any and all discovery provided by IDS in that circuit court case, if BellSouth truly insists upon pursuing the court file (i.e., pleadings and discovery), it should be required at its own expense to go to Tampa and/or coordinate with IDS's counsel in Tampa, in order to review the file.

Analysis

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Prehearing Officer 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 162 (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). This standard is equally applicable to reconsideration by the Commission of a Prehearing Officer's order. See Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

BellSouth has failed to meet the standard for a motion for reconsideration. BellSouth has failed to identify any issue of fact or law which the Prehearing Officer overlooked in rendering his decision, or which the Prehearing Officer failed to consider. While BellSouth expresses dissatisfaction with the discovery responses it received, BellSouth has not identified an error in the Prehearing Officer's decision, which found IDS's supplemental responses rendered BellSouth's Motion to Compel, based on IDS's failure to respond, moot. BellSouth does not contend that IDS did not provide supplemental responses to the discovery requests at issue, but rather that the responses it got were not satisfactory. BellSouth's dissatisfaction with the responses was not, however, the basis of BellSouth's Motion to Compel as addressed by the Prehearing Officer, and as such, is not a basis for reconsideration.

Although the uniform rules do not provide for a reply brief or memoranda to IDS's response, the uniform rules do permit amendments to motions based on changed circumstances.[1] BellSouth could have sought leave to amend its motion to compel or could have filed a new motion to compel seeking more specific responses based on the changed circumstances. However, BellSouth failed to do either, but rather waited to file for reconsideration. Staff notes that the supplemental responses came in June 9, 2004, and Order No. PSC-04-0635-PCO-TP was issued July 1, 2004. There was sufficient time for BellSouth to review those responses and file the appropriate pleading. BellSouth's decision not to apprise the Prehearing Officer of its view of the responses and decision not to affirmatively seek further relief, does not constitute a failure by the Prehearing Officer. Nevertheless, BellSouth appears to have the information it sought through the interrogatories. Moreover, IDS appears willing to make any documentation it has relating to the circuit court case available to BellSouth in Tampa at BellSouth's expense.

BellSouth has not identified a mistake of fact or law in the Prehearing Officer's decision. Thus, staff recommends that BellSouth's Motion for Reconsideration should be denied.

[1] Rule 28-106.202, Florida Administrative Code, permits the amending of petitions upon order of the presiding officer.

**Issue 2**: Should this docket be closed?

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

**Staff Analysis**: This matter is currently scheduled for an administrative hearing on September 10, 2004. Thus, this docket should remain open pending further proceedings.