

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. against IDS Telecom LLC to enforce interconnection agreement deposit requirements.	DOCKET NO. 040488-TP ORDER NO. PSC-04-0699-PCO-TP ISSUED: July 19, 2004
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ORDER DENYING BELL SOUTH'S MOTION TO STRIKE PORTIONS OF IDS'S BRIEF

BY THE COMMISSION:

On May 21, 2004, BellSouth Telecommunications, Inc. (BellSouth, or Petitioner) filed a complaint against IDS Telecom LLC (IDS) to enforce certain deposit requirements in their Interconnection Agreement¹ (hereafter, the Deposit Complaint). The specific requirement at issue states that service may be terminated if the dispute before the Commission is not resolved in 60 days. See BellSouth's Exhibit A, attached to the Deposit Complaint) Day 60 is July 21, 2004. Although separate, this docket is closely aligned with Docket No. 031125-TP, a pending billing dispute involving these two parties. Docket No. 031125-TP (hereafter, the Billing Complaint docket) is currently set for a September 10, 2004 hearing.

On June 11, 2004, IDS filed its Answer and Affirmative Defenses and Counterclaim to BellSouth's Deposit Complaint (Answer). On June 21, 2004, BellSouth filed an Answer to the IDS Counterclaim.

Due to the expedited nature of this proceeding, staff and the parties agreed that the parties would provide informational briefs to assist our staff in formulating an initial recommendation for our consideration within the 60 day time limitation². Due to the time constraints of this matter, the filing schedule will enable a Commission decision within 60 days of BellSouth's petition. On June 28, 2004, BellSouth filed its Brief in this matter. IDS filed its Brief on June 29, 2004.

On July 7, 2004, BellSouth filed its Motion to Strike Portions of IDS's Brief. On July 15, 2004, IDS filed its Response and Opposition to Petitioner BellSouth's Motion to Strike Portions of IDS's Brief.

¹ The current interconnection agreement between BellSouth and IDS became effective by operation of law on May 11, 2003. (See Docket No. 030158-TP)

² This matter is scheduled to be addressed at the July 20, 2004, Agenda Conference.

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BellSouth's Motion

BellSouth contends that in its Brief, IDS references the existence and the substance of confidential settlement discussions held with BellSouth on the deposit issue. BellSouth states that it asked IDS to remove these reference from its Brief, but it would not.

BellSouth cites Section 90.408, Florida Statutes, that states "evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claims on its value." BellSouth argues that under Rule 90.408, Florida Code of Evidence, the references in IDS's Brief are being used to support its position and are, therefore, improper. BellSouth argues that the references to the matter should be stricken.

IDS's Response

IDS states that the nature of discussions between its representatives and BellSouth's representative related to BellSouth's practices regarding deposits; specifically, accumulation of security deposits over time by CLECs and other forms of security. IDS claims that there never was any agreement between the parties as to the confidentiality of discussions relating to the deposit issue. IDS asserts that BellSouth's Motion to Strike does not state or even contend that the parties agreed that discussions relating to the deposit issues were confidential.

IDS contends that the factual background is important, in that, these discussions occurred primarily in the March to April 2004 timeframe, before BellSouth's Counterclaim was filed in Docket No. 031125-TP. IDS argues that BellSouth's reliance on Section 90.408, Florida Statutes, is misplaced for several reasons. First, IDS asserts that the parties never agreed to the confidentiality of the discussions relating to the deposit issue. Second, IDS asserts that Section 90.408, Florida Statutes, may not apply to these administrative proceedings. Even assuming it does, IDS argues the discussions did not relate directly to the settlement of this docket, nor is IDS attempting to use the discussions to establish either liability, the absence of liability, or amount. Thus, IDS contends that such discussions at issue here fall outside the scope of the statute.

Further, IDS claims that such discussions would be allowed under Section 120.569, Florida Statutes, that provides:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be

received in written form, and all testimony of parties and witnesses shall be made under oath.

IDS asserts that the phrase “commonly relied upon by reasonably prudent persons,” includes representations by one party to another such as the deposit issue which is admissible in this proceeding, which might not be admissible in a Florida Court. IDS contends that Section 90.408, Florida Statutes, is inapplicable in this instance.

IDS cites several cases to demonstrate that 90.408, Florida Statutes, is inapplicable to the discussion of the deposit issue. See, Southeast Capital Investment Corp. v. Albermarle Hotel, Inc., 550 So. 2d. 49, 52 (Fla. 2nd DCA 1989) (only offers to compromise are covered by Section 90.408, general discussions on the issues or seeking to induce a party to agree upon different terms, do not constitute an offer to compromise); Ritter v. Ritter, 690 So.2d 1372, 1376 (Fla. 2d DCA 1997) (settlement discussions in a different case are not prohibited by Fla. Stat. Sec. 90.408); and Levin v. Ethan Allen, Inc., 823 So.2d 132, 135 (Fla. 4th DCA 2002) (settlement offer made in one case was relevant and admissible in a different case between the same parties).

IDS states that under Section 90.408, Florida Statutes, the negotiations must relate to an actual lawsuit that has already been filed. See, H.R.J. Bar-B-Q, Inc. v. Shapiro, 463 So. 2d 403, 404 (Fla. 3d DCA 1985) (the admission of settlement discussions before a lawsuit has been filed are not precluded by Fla. Stat. Sec. 90.408); Minton v. Shaw, 416 So. 2d 3, 4 (Fla. 3d DCA 1982) (settlement negotiations prior to the time an action was pending are not precluded); and Frank v. Ruwitch, 318 So. 2d 188, 189 (Fla. 3d DCA 1975) (proposed and unsigned settlement discussions drafted prior to the lawsuit being filed were not inadmissible). IDS argues that this docket had not yet even been filed when the discussions took place, thus BellSouth’s contentions are erroneous.

IDS contends that finally, Section 90.408, Florida Statutes, only excludes evidence of settlement negotiations when the evidence is offered “to prove liability, the absence of liability, or its value.” See, Section 90.408, Florida Statutes; Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 925 (Fla. 2d DCA 2000) (the Court found that evidence of settlement negotiations is admissible to establish other relevant facts. To the extent that the ‘contract information’ addresses other than liability or value, it would necessarily be excluded under Section 90.408, Florida Statutes); and Sperry Remington Office Machines v. Stelling, 383 So. 2d 1150, 1152 (Fla. 1st DCA 1980) (where liability was not at issue, evidence of earlier settlement negotiations was admissible to prove other matters). IDS asserts that the discussions are only offered to address the issue of timeframe for the accumulation of a security deposit or any alternative form of security. IDS contends that since none of the discussions between the parties referenced in the brief related to either BellSouth’s right to compel IDS to post security (liability or absence of liability), or the amount of the security (value), Section 90.408, Florida Statutes, does not exclude the use of this evidence. IDS concludes that for the reasons provide above, BellSouth’s Motion to Strike should be denied.

Decision

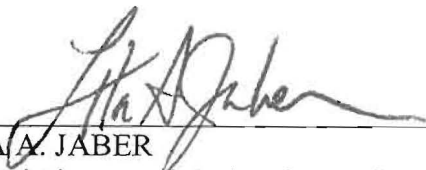
I have reviewed and considered arguments made in BellSouth's Motion to Strike Portions of IDS's Brief and in the IDS Response. At the start, I note that the underlying Deposit Complaint is not yet scheduled for hearing pursuant to Chapter 120, Florida Statutes.³ As such the Commission has not yet heard evidence in this matter. In fact, this proceeding is expedited in nature and is designed to provide the Commissioners with all the information necessary to afford them the opportunity in which to make the most informed decision. Consistent with this purpose, the briefs filed by the parties have been offered to provide information regarding the deposit dispute and are not being used as evidence at a hearing.

As stated earlier, this proceeding is not set for hearing and, instead, is scheduled for consideration of possible proposed agency action. Therefore, as Section 90.408, Florida Statutes, applies to evidence being admitted during a trial or hearing, it appears to be inapplicable. Based on the foregoing, BellSouth's Motion to Strike Portions of IDS's Brief is denied.

Based on the foregoing, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Strike Portions of IDS's Brief is hereby denied.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 19th day of July, 2004.



LILA A. JABER
Commissioner and Prehearing Officer

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³ Since this matter is being disposed of based on other grounds, it is unnecessary to discuss IDS's argument regarding the applicable evidentiary standard under Chapter 120, Florida Statutes.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.