

ORIGINAL

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A ECENIA
RICHARD M ELLIS
KENNETH A HOFFMAN
THOMAS W KONRAD
MICHAEL G MAIDA
MARTIN P McDONNELL
J. STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

R DAVID PRESCOTT
HAROLD F X PURNELL
MARSHA E RULE
GARY R. RUTLEDGE
GOVERNMENTAL CONSULTANTS
MARGARET A MENDUNI
M LANE STEPHENS

February 6, 2004

Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

VIA HAND DELIVERY

Re: Complaint by IDS Telecom LLC Against BellSouth Telecommunications, Inc.
Docket No. 031125-TP

RECEIVED FPSC
BY FEB -6 PM 4:36
COMMISSION
CLERK

Dear Ms. Bayo:

Enclosed for filing on behalf of IDS Telecom LLC are the original and fifteen copies each of IDS Telecom LLC's Response to BellSouth's Partial Motion to Dismiss and Answer and IDS Telecom LLC's Request for Oral Argument.

Please acknowledge this filing by date-stamping and returning the enclosed copy of this letter.

Thank you for your assistance with this filing.

Sincerely,

Suzanne Young (handwritten signature)

Suzanne Young, Assistant to
Marsha E. Rule, Esq.

AUS
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CMP
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cc: All Counsel

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01789 FEB-6 04

FPSC-COMMISSION CLERK

**FLORIDA PUBLIC SERVICE COMMISSION**

Complaint of IDS Telecom LLC against )  
BellSouth Telecommunications, Inc. for ) Docket No. 031125-TP  
over billing and discontinuance of service, and )  
petition for emergency order restoring service ) Filed: February 6, 2004  
\_\_\_\_\_)

**IDS TELECOM LLC's RESPONSE  
TO BELLSOUTH'S PARTIAL MOTION TO DISMISS  
AND ANSWER**

PETITIONER IDS TELCOM, LLC ("IDS"), by and through its undersigned counsel and pursuant to Rule 1.100, Florida Rules of Civil Procedure and Rule 28-106.204, Florida Administrative Code, hereby files this Response to BELLSOUTH TELECOMMUNICATIONS, INC.'S ("BellSouth's") Partial Motion to Dismiss. In support, IDS shows as follows:

1. BellSouth asks the Commission to dismiss IDS's Amended Complaint (2) "to the extent it seeks a finding that BellSouth has violated federal law" and (b) "to the extent that it seeks a finding that BellSouth has breached the Settlement Agreement and/or the Settlement Amendment." BellSouth's Motion to Dismiss must be denied. The Commission may properly consider evidence and argument regarding such issues in connection with IDS's Amended Complaint and Petition, and may make such findings it determines to be appropriate in connection therewith.

**IDS ASKED THE COMMISSION TO INTERPRET AND ENFORCE AN  
INTERCONNECTION AGREEMENT AND THE COMMISSION HAS CLEAR  
AUTHORITY TO DO SO**

2. IDS properly petitioned the Commission for resolution of certain disputes arising from its interconnection agreements with BellSouth. Specifically, IDS explained

DOCUMENT NUMBER 031125-TP

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FPSC-COMMUNICATIONS

that IDS and Bellsouth entered into two interconnection agreements for the provision of telecommunications services within the state of Florida; that BellSouth billed IDS pursuant to the agreements; that IDS disputed some of BellSouth's billings in good faith; that the agreements prohibit BellSouth from discontinuing service to IDS for non-payment of disputed billings; and that BellSouth nevertheless discontinued LENS service to IDS for non-payment of disputed billings. These allegations must be taken as true for purposes of reviewing BellSouth's Motion to Dismiss. See Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993); and Brown v. Moore, 765 So.2d 749 (Fla. 1<sup>st</sup> DCA 2000).

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

THE COMMISSION HAS AUTHORITY TO MAKE THE FINDINGS  
REQUESTED BY IDS

4. BellSouth argues that the Commission lacks subject matter jurisdiction to "resolve and enforce purported violations of federal law" or to "interpret and enforce a settlement agreement." BellSouth misstates IDS's claim. IDS has not asked the Commission to enforce federal law or its Settlement Agreement. To the contrary, IDS asks the 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. Importantly, the Amended Complaint seeks no relief specific to such findings, but merely reiterates IDS's request that the Commission resolve the interconnection dispute in IDS's 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. It is axiomatic that the Commission may consider such issues and make such findings as may be necessary to its resolution of any complaint lawfully placed before it. BellSouth has cited to no authority that prevents the Commission from considering the issues raised by IDS or making the findings which IDS seeks.

5. BellSouth relies on Order No. PSC-03-1392-FOF-TP in support of its argument that the Commission should dismiss IDS's request for a finding that BellSouth has violated federal law. BellSouth's reliance is entirely misplaced. Unlike the present case, where IDS asks the Commission to interpret and enforce an interconnection agreement, *Supra Telecommunications and Information Systems, Inc.* ("Supra") asked the Commission to enforce a federal statute. Noting that it was "not authorized to take administrative action based solely on federal statutes", the Commission found that it "cannot provide a remedy . . . for a violation of 47 U.S.C. §222(b)." The Commission acknowledged, however, that while it could not "provide a remedy" for any violation of a federal statute *per se*, it could was empowered to "interpret [a] federal provision and apply it to the facts of this case." Order No. PSC-03-1392-FOF-TP, at page 5.

6. 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. Unlike *Supra*, IDS 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. Rather, IDS seeks enforcement of its interconnection agreements with BellSouth, and the particular relief sought is specific to the terms of those agreements. The fact that IDS asserts that BellSouth’s actions *also* constitute violations of federal law does not remove this Commission’s authority to review those actions.

7. 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. *First*, the Settlement Agreement forms the basis for billing disputes under the Current Agreement. BellSouth has declared that IDS’s alleged 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, on the other hand, has raised good faith disputes regarding BellSouth’s billings pursuant to the Settlement Agreement. The Commission therefore must review and interpret the Settlement Agreement in order to resolve Counts One, Two and Four of IDS’s Amended Complaint.

8. *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 added).

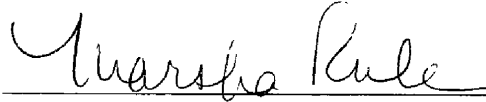
9. See Section 31.1, General Terms and Conditions, Current Agreement, attached hereto as Exhibit “A”. The Commission’s review of the Settlement Agreement is an essential step in resolution of the instant interconnection dispute. BellSouth can point to no case or statute that prohibits the Commission from reviewing and interpreting the Settlement Agreement in this context.<sup>1</sup> Finally, BellSouth’s Motion is deficient in that it has not specified exactly what portion of IDS’s Amended Complaint it seeks to dismiss. IDS’s Amended Complaint details five separate counts against BellSouth, yet BellSouth has failed to identify any of them in its Motion. It thus appears that BellSouth improperly is attempting to bar from this proceeding evidence and argument relating to the Settlement Agreement or federal law. This is not the proper purpose of a Motion to Dismiss, and BellSouth’s Motion should be denied.

WHEREFORE, IDS respectfully requests that the Commission deny BellSouth’s Motion to Dismiss IDS’s Amended Complaint.

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<sup>1</sup> IDS concedes, however, that if its Amended Complaint only alleged a breach of a Settlement Agreement, the Commission would lack subject matter jurisdiction over the complaint. Thus, if BellSouth were *only* seeking to dismiss Count Three of the Amended Complaint, IDS might agree with BellSouth’s position. As noted below, however, 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.

Respectfully submitted,

A handwritten signature in cursive script that reads "Marsha Rule". The signature is written in black ink and is positioned above a horizontal line.

MARSHA E. RULE, ESQ.

MARTIN P. MCDONNELL, ESQ.

Rutledge, Ecenia, Purnell & Hoffman, P.A.

P.O. Box 551

Tallahassee, Florida 32302

(850) 681-6788 (Telephone)

(850) 681-6515 (Telecopier)

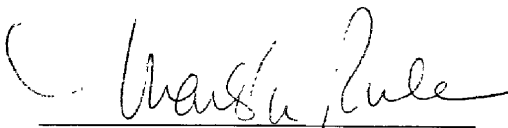
Attorneys for IDS Telecom LLC

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT a copy of the foregoing was furnished by hand delivery this 6<sup>th</sup> day of February, 2004, to the following:

Beth Keating, Esq.  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Ms. Nancy H. Simms  
BellSouth Telecommunications, Inc.  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301-1556

  
MARSHA E. RULE, ESQ.



**27. Good Faith Performance**

Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

**28. Nonexclusive Dealings**

This Agreement does not prevent either Party from providing or purchasing services to or from any other person nor, except as provided in Section 252(i) of the Act, does it obligate either Party to provide or purchase any services (except insofar as the Parties are obligated to provide access to Interconnection, services and Network Elements to IDS Telecom as a requesting carrier under the Act).

**29. Rate True-Up**

29.1 This section applies to Network Interconnection and/or Unbundled Network Elements and Other Services rates that are expressly subject to true-up under this Agreement.

29.2 The designated true-up rates shall be true-up, either up or down, based on final prices determined either by further agreement between the Parties, or by a final order (including any appeals) of the Commission. The Parties shall implement the true-up by comparing the actual volumes and demand for each item, together with the designated true-up rates for each item, with the final prices determined for each item. Each Party shall keep its own records upon which the true-up can be based, and any final payment from one Party to the other shall be in an amount agreed upon by the Parties based on such records. In the event of any disagreement as between the records of the Parties regarding the amount of such true-up, the Parties shall submit the matter to the Dispute Resolution process in accordance with the provisions of Section 10 of the General Terms and Conditions of this Agreement.

29.3 An effective order of the Commission that forms the basis of a true-up shall be based upon cost studies submitted by either or both Parties to the Commission and shall be binding upon BellSouth and IDS Telecom specifically or upon all carriers generally, such as a generic cost proceeding.

**30. Survival**

The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

**31. Entire Agreement**

31.1 This Agreement means the General Terms and Conditions, the Attachments identified in Section 31.2 below, and all documents identified therein, as such may be amended from time to time and which are incorporated herein by reference, all of which, when taken together, are intended to constitute one indivisible agreement. This 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 Telecom 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. Neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

31.2 This Agreement includes Attachments with provisions for the following:

- Resale
- Network Elements and Other Services
- Network Interconnection
- Collocation
- Access to Numbers and Number Portability
- Pre-Ordering, Ordering, Provisioning, Maintenance and Repair
- Billing
- Rights-of-Way, Conduits and Pole Attachments
- Performance Measurements
- BellSouth Disaster Recovery Plan
- Bona Fide Request/New Business Request Process

31.3 The following services are included as options for purchase by IDS Telecom pursuant to the terms and conditions set forth in this Agreement. IDS Telecom may elect to purchase said services by written request to its Local Contract Manager if applicable:

- Optional Daily Usage File (ODUF)
- Enhanced Optional Daily Usage File (EODUF)
- Access Daily Usage File (ADUF)
- Line Information Database (LIDB) Storage
- Centralized Message Distribution Service (CMDS)