

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 031125-TP

In the Matter of:

COMPLAINT AGAINST BELLSOUTH
TELECOMMUNICATIONS, INC. FOR ALLEGED
OVERBILLING AND DISCONTINUANCE OF
SERVICE, AND PETITION FOR EMERGENCY
ORDER RESTORING SERVICE, BY IDS
TELECOM LLC.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 2A

BEFORE: CHAIRMAN BRAULIO L. BAEZ
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER LILA A. JABER
 COMMISSIONER RUDOLPH "RUDY" BRADLEY
 COMMISSIONER CHARLES M. DAVIDSON

DATE: Tuesday, April 6, 2004

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
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1 PARTICIPATING:

2 JAMES MEZA III, ESQUIRE, BellSouth
3 Telecommunications, Inc., c/o Ms. Nancy H. Sims, 150 South
4 Monroe Street, Suite 400, Tallahassee, Florida 32301-1556,
5 appearing on behalf of BellSouth Telecommunications, Inc.

6 NORMAN H. HORTON, JR., Esquire, Messer, Caparello and
7 Self, 215 South Monroe Street, Tallahassee, Florida 32301,
8 appearing on behalf of IDS Telecom LLC.

9 PATTY CHRISTENSEN, ESQUIRE, FPSC Office of General
10 Counsel, 2540 Shumard Oak Boulevard, Tallahassee, Florida
11 32399-0850, appearing of behalf of the Florida Public Service
12 Commission Staff.

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P R O C E E D I N G S

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CHAIRMAN BAEZ: We are now on Item 2A.

Ms. Christensen, you had let me know that you needed -- you had a correction to make?

MS. CHRISTENSEN: Correct. I can do that now with the introduction.

CHAIRMAN BAEZ: Okay. Why don't we take care of that before we hear from the parties.

MS. CHRISTENSEN: Okay. Commissioners, Item 2A is staff's recommendation to grant BellSouth's partial motion to dismiss. Specifically, the Staff recommends dismissing Count Three, seeking relief for alleged violation of the settlement agreement, and Count Five, seeking relief for alleged violation of the Act. Staff would also like to make an oral modification to Page 9, the last paragraph, last sentence, which should read, "Dismissal of Count Three, however, does not prevent the Commission from considering the settlement agreement as evidence in the current dispute."

Staff is available to answer any questions, and I believe the parties have --

CHAIRMAN BAEZ: And that is the balance of the changes you need to make?

MS. CHRISTENSEN: That is the extent of the changes that Staff wishes to make; and we are available for questions, and I believe the parties would like to address the Commission.

1 CHAIRMAN BAEZ: Very well. And, Mr. Meza, go ahead.

2 MR. MEZA: Yes, it is BellSouth's motion. Thank you,
3 Mr. Chairman. And my arguments go directly to Staff's oral
4 modification, and specifically it relates to the analysis that
5 the Commission should dismiss Count Three of IDS's complaint
6 which requires or asks the Commission to enforce and interpret
7 the confidential private settlement agreement between IDS and
8 BellSouth, while also recommending to this Commission that
9 notwithstanding the dismissal of that count, it can construe
10 and consider the settlement agreement as evidence.

11 As Staff correctly points out in its recommendation,
12 this Commission does not have subject matter jurisdiction to
13 enforce and interpret private contracts that are 952
14 arbitration contracts, and I will cite to you the United
15 Telephone case, which is a Supreme Court decision finding that
16 this Commission does not have jurisdiction to alter contractual
17 relationships between telephone companies. There is also Order
18 Number 95-0536 where this Commission refused to interpret the
19 terms of a settlement agreement. And likewise in Order
20 95-0209, the Commission granted a motion to dismiss a petition
21 requesting that it interpret and resolve a contract dispute.

22 And that is exactly what we have here. IDS has
23 claimed in its complaint that BellSouth violated the terms of a
24 settlement agreement by disconnecting access to LENS for
25 failure to -- in IDS's view of the world, even though IDS

1 complied with the terms of the settlement agreement. So they
2 have taken the position that the disconnection of LENS, which
3 is now back on, was improper under the terms of that agreement.
4 And Staff correctly points out that you don't have jurisdiction
5 to make that finding or to even consider and construe the terms
6 of that settlement agreement, yet also finds that you can
7 consider the settlement agreement as evidence.

8 That is inherently inconsistent. Because if you
9 don't have jurisdiction to enforce and interpret the terms of
10 the settlement agreement, then logically I would presume if you
11 don't have the ability to consider it as evidence, because to
12 consider it as evidence would require you to interpret and
13 enforce the settlement agreement.

14 So I would recommend that you please adopt Staff's
15 recommendation with the caveat that you not find that you have
16 the authority to consider the settlement agreement as evidence
17 because to do so would necessarily violate the limits of your
18 authority. Thank you.

19 CHAIRMAN BAEZ: Thank you, Mr. Meza. Mr. Horton.

20 MR. HORTON: Yes. Thank you, Mr. Chairman. Norman
21 H. Horton, Jr., Messer, Caparello and Self on behalf of IDS
22 Telecom. And we filed a notice of appearance for IDS yesterday
23 in this proceeding.

24 To move this along, let me just address what Mr. Meza
25 has discussed about whether it is evidence or not. We have

1 alleged that BellSouth has violated their interconnection
2 agreements with us by terminating the LENS service. The
3 settlement agreement is involved. I think at best to make any
4 determination at this point whether it is or is not evidence
5 would be premature. I think there is a basis for using the
6 settlement agreement in this proceeding as we go along, and I
7 think that the time to make a decision as to whether it should
8 be admitted as evidence or not is at the time that I try to use
9 it or Mr. Meza tries to use it rather than at this point.

10 At no point up until now has BellSouth asked that the
11 settlement agreement not be considered evidence, so I think it
12 is, again, prematurely before you, and it is not necessary to
13 make the decision whether it would be evidence or not evidence,
14 and the time to do that is as we go forward. That is primary
15 it. And I would even note that in their response in the answer
16 BellSouth suggests an affirmative defense of the settlement in
17 accord, and I don't know exactly what they are going to
18 approach with that, but it seems to me that the question of
19 whether or not the settlement agreement will or will not be
20 evidence would be decided when somebody tries to use it.

21 CHAIRMAN BAEZ: Thank you, Mr. Horton.

22 Commissioners, do you have any questions?

23 Commissioner Bradley.

24 COMMISSIONER BRADLEY: I have a question of General
25 Counsel. Mr. Melson, I'm looking at Staff's recommendation,

1 and as it relates to Issue 1 it states that this Commission
2 does not have subject matter jurisdiction. What would your
3 opinion be of Staff's rendering?

4 MR. MELSON: To the extent the complaint alleges a
5 violation of the federal act, the Commission does not have
6 subject matter jurisdiction. You do have jurisdiction over the
7 interconnection agreement itself, which the Commission
8 approved. BellSouth has got several different counts in its
9 complaint, and I think Staff correctly analyzed those and
10 determined that there are three of the counts that you do have
11 jurisdiction over and two counts where you lack subject matter
12 jurisdiction.

13 COMMISSIONER BRADLEY: So, basically what we have is
14 what I would call a hodgepodge here. We have some matters that
15 we have jurisdiction over and some that we don't have
16 jurisdiction over.

17 MR. MELSON: Yes, sir. If you look at Page 2 of the
18 recommendation, there is a listing of the five counts in the
19 complaint. The first count talks about the violation of the
20 Florida Administrative Code. Clearly you have jurisdiction
21 over that. The second relates to the interconnection
22 agreement. You clearly have jurisdiction over that. And then
23 Count Four relates to violation of the anticompetitive
24 provision of the Florida Statutes. You clearly have
25 jurisdiction over that.

1 Count Five relating to the Telecommunications Act and
2 a separate violation of that is one that you do not have
3 jurisdiction over. And Count Three is probably a little closer
4 call. I agree with the Staff's analysis that you don't have
5 jurisdiction to enforce that settlement agreement.

6 This is no different than you would see in a circuit
7 court case where a party plead three or four different counts
8 and the court determined that it had jurisdiction over some and
9 did not have jurisdiction over others.

10 CHAIRMAN BAEZ: No more questions?

11 Commissioner Davidson, you had a question?

12 COMMISSIONER DAVIDSON: Yes. Also for General
13 Counsel, and also for the parties if they have any supplement
14 to Mr. Melson's answer, what is the relationship between the
15 settlement agreement and the parties' interconnection
16 agreement?

17 MR. MELSON: As I understand it, the settlement
18 agreement, the parties had disputes about amounts payable under
19 the interconnection agreement and ultimately entered into a
20 separate settlement agreement to deal with how those amounts
21 would -- what amounts would be paid and over what time. That
22 agreement, though, unlike the interconnection agreement itself,
23 did not come to the Commission for approval.

24 COMMISSIONER DAVIDSON: So it is fair to state that
25 the settlement agreement relates to the interconnection

1 agreement, but that it was not specifically approved by the
2 Commission?

3 MR. MELSON: I believe that is correct, yes, sir.

4 COMMISSIONER DAVIDSON: And just one follow-up. Even
5 assuming for this question that we wouldn't have jurisdiction
6 to determine the rights and obligations of the parties under
7 the settlement agreement, I'm not aware of a legal principle
8 that would preclude us from looking at that agreement for
9 evidentiary purposes, but help me out there.

10 MR. MELSON: No, I agree with you. To the extent
11 that the settlement agreement -- and I have not read the
12 settlement agreement, but to the extent by its terms it does
13 not preclude its use in interpreting the underlying agreement,
14 I see no reason that you could not use it as evidence.

15 I think I have to agree with Mr. Horton, though, that
16 the issues before you today are really whether or not to grant
17 the motion to dismiss, and any questions about the evidentiary
18 use of that settlement agreement really are not germane to the
19 issue in front of you, and is something that is probably better
20 left for the hearing stage of the docket.

21 COMMISSIONER DAVIDSON: And that's fine. I asked
22 simply because one of the parties raised it. But as I sit
23 here, I'm still not quite comfortable on this, that sort of how
24 we handle an agreement by the parties that addresses rights and
25 obligations that we addressed in an order. I want to make sure

1 that we don't inadvertently create some loophole so that we
2 address something in an order and the parties sort of in the
3 future materially perhaps modify that or address what we have
4 addressed, and that is no longer sort of within our purview,
5 notwithstanding that we have addressed the general subject
6 matter of that issue in a prior case.

7 So what is your comfort level with the proposition
8 that we can have jurisdiction over an interconnect agreement
9 obviously, but if the parties subsequently modify or address
10 that agreement with a subsequent agreement we would not have
11 jurisdiction over that subsequent agreement?

12 MR. MELSON: I think I would draw a distinction,
13 Commissioner, between an amendment to the interconnection
14 agreement which would have to come back to the Commission for
15 approval, and which we would have jurisdiction over -- excuse
16 me, I've got a frog in my throat this morning -- and a
17 settlement agreement which resolves a particular dispute that
18 the parties have had under the interconnection agreement, but
19 does not amend the agreement or rise to the level that it has
20 got to come back to you for approval.

21 COMMISSIONER DAVIDSON: And I'm assuming that the
22 settlement agreement here, the proper venue for that would be
23 state court, or wherever the parties -- does that agreement
24 with a dispute resolution clause in it?

25 MR. MEZA: It says that -- well, I don't know if I'm

1 at liberty to disclose the contents of the settlement..

2 COMMISSIONER DAVIDSON: That's fine.

3 MR. MEZA: I would like to modify something Mr.
4 Melson said to put it in perspective. What happened is that
5 the disputes resolved via the settlement agreement were under a
6 prior interconnection agreement that was necessarily -- I don't
7 know if it was incorporated into the current interconnection
8 agreement, but the current interconnection agreement in the
9 mergers provision specifically refers to the settlement
10 agreement and says that notwithstanding the settlement
11 agreement, all other agreements between the parties are
12 superseded by this agreement.

13 So you have two separate functioning agreements
14 operating between the parties. You have the current
15 interconnection agreement, which this Commission has approved,
16 and a private resolved commercial contract to resolve billing
17 disputes between the parties that was not approved by the
18 Commission.

19 COMMISSIONER DAVIDSON: Which would be litigated in
20 court.

21 MR. MEZA: Yes, in court as a breach of contract.

22 COMMISSIONER DAVIDSON: Fine. That answers
23 everything from me, Chairman.

24 CHAIRMAN BAEZ: And I need to get a couple of
25 questions. I'm sorry, we will go down the line, Commissioners.

1 Any other questions?

2 A quick question to whoever can answer it, I guess.
3 Mr. Horton, I heard you say that the settlement agreement
4 somehow plays into the three remaining counts, is that
5 accurate?

6 MR. HORTON: Mr. Chairman, to be quite honest with
7 you, I haven't gone all the way through it in the short amount
8 of time that I have had it, but I do believe that it could be
9 raised in some of those other counts.

10 CHAIRMAN BAEZ: As an affirmative --

11 MR. HORTON: Well, BellSouth has raised an
12 affirmative defense of settlement in accord in their answer. I
13 don't know -- I don't know to what -- I don't want to put words
14 in their mouth. I don't want to say that they are using the
15 settlement agreement, but --

16 MR. MEZA: The affirmative defense of accord and
17 satisfaction was raised in an abundance of caution in case this
18 Commission does not agree with our interpretation of its
19 authority.

20 CHAIRMAN BAEZ: Okay.

21 MS. CHRISTENSEN: And it is Staff's understanding
22 that certain aspects of the settlement agreement play into
23 whether or not the current interconnection agreement was
24 violated. So that is the reason for Staff saying that at least
25 at this point we are not willing to make that distinction.

1 CHAIRMAN BAEZ: And I just want to be clear that the
2 intent of the modification that you made is not to settle the
3 question, the evidentiary question here. I mean, is that a
4 fair understanding?

5 MR. MEZA: That's fine. That's fair. Yes, sir.

6 MS. CHRISTENSEN: Correct. It's just we wanted to
7 ensure that by dismissing Count Three, we weren't precluding it
8 as a future evidentiary question.

9 CHAIRMAN BAEZ: Okay. Mr. Meza, I know what you
10 would you like us to do, and you stated it, but, I mean, do you
11 see it as more of a comfort that that question gets preserved
12 and all your rights to --

13 MR. MEZA: Yes, sir. My only concern was that the
14 issue of whether or not this agreement can be before this
15 Commission as an evidentiary basis be preserved at the
16 appropriate time and not handled through a Staff
17 recommendation.

18 CHAIRMAN BAEZ: Very well. Commissioners, any more
19 questions or a motion?

20 COMMISSIONER JABER: I move staff as modified, Mr.
21 Chairman.

22 COMMISSIONER DEASON: Second.

23 COMMISSIONER BRADLEY: Second.

24 CHAIRMAN BAEZ: Moved and a second. All those in
25 favor say aye.

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(Unanimous affirmative vote.)

CHAIRMAN BAEZ: Thank you all.

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STATE OF FLORIDA)

COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 12th day of April, 2004.



JANE FAUROT, RPR
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