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May 14, 2004

**BY E-MAIL**

Ms. Blanca Bayó, Director  
Commission Clerk and Administrative Services  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 031125-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of IDS Telcom, LLC, is an electronic version of IDS Telecom, LLC's Response and Opposition to BellSouth's Motion for Leave to Amend Answer to Assert Counterclaim in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Norman H. Horton, Jr.

Norman H. Horton, Jr.

NHH/amb  
Enclosures  
cc: Parties of Record

**FLORIDA PUBLIC SERVICE COMMISSION**

Complaint of IDS Telcom, LLC against )  
BellSouth Telecommunications, Inc. for ) Docket No. 031125-TP  
over billing and discontinuance of service, and )  
petition for emergency order restoring service ) Filed: May 14, 2004

**PETITIONER IDS TELCOM’S RESPONSE AND  
OPPOSITION TO BELL SOUTH’S MOTION FOR LEAVE  
TO AMEND ANSWER TO ASSERT COUNTERCLAIM**

**PETITIONER IDS TELCOM, LLC** (“IDS”), by and through its undersigned counsel and pursuant to Rule 28-106.204, hereby files this response and opposition to the Respondent BellSouth Telecommunications, Inc.’s (“BellSouth”) Motion For Leave To Amend Answer To Assert Counterclaim (“Motion”), and in support thereof states as follows:

**I. PROCEDURAL BACKGROUND**

1. On or about December 23, 2003, IDS opened this docket by filing a petition against BellSouth seeking immediate restoration of LENS and resolution of a monetary dispute arising under a settlement agreement that resolved, in part, a prior docket before this Commission.

2. On or about December 30, 2003, IDS filed its Amended Complaint By IDS Telcom, LLC Against BellSouth Telecommunications, Inc. For Overbilling And Discontinuance Of Service, And Petition For Emergency Order Restoring Service ("amended petition") pursuant to Rule 28-106.202, Florida Administrative Code.

3. The amended petition alleged five related counts (two of which have been dismissed). All five counts incorporated by reference general allegations, which state in summary as follows. On or about May 11, 2001, IDS filed a complaint against BellSouth with this Commission (Docket No. 010740-TP). On or about September 27, 2001, IDS and BellSouth settled the 01-

0740 Docket and two other litigations by way of a settlement agreement; which was later amended on or about March 25, 2002. Although IDS made all payments due under the settlement agreement (as amended), BellSouth attempted to change the settlement and unilaterally insisted on IDS making additional payments beyond those previously agreed. When IDS disputed these additional charges and refused to pay BellSouth, BellSouth unilaterally declared these disputed amounts "undisputed" and terminated IDS' access to LENS. Neither the petition nor amended petition allege any other disputes for resolution in this docket.

4. 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. BellSouth's Partial Motion To Dismiss And Answer did not imply or otherwise contend that any other disputes were at issue in this docket, other than BellSouth's disconnection of LENS and its over-billing of the settlement agreement special account.

5. On May 6, 2004, this Commission entered its Order Establishing Procedure (Document No. 05308) in this docket, which set: (a) July 22, 2004 as the deadline for filing direct testimonies; and (b) October 14, 2004 as the date for conducting a one-day evidentiary hearing in this docket. The schedule was set based upon the limited number of issues originally presented in IDS' amended petition.

6. On or about May 7, 2004, BellSouth filed the instant Motion for Leave to Amend Answer to Assert Counterclaim.. In this Motion , BellSouth claims for the first time that it believed this docket contained numerous other billing disputes that are simply not alleged in the petition or amended petition. In the amended petition, IDS alleged 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 this Commission requesting informal dispute resolution under Rule 25-22.032(6), F.A.C. That informal dispute request was closed because staff believed the informal procedure was not appropriate for disputes between CLECs and ILECs. The purpose of this reference was clearly to allege that BellSouth had ignored the parties' interconnection agreement which precluded BellSouth from denying service for failure to pay disputed amounts. 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. 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.

7. BellSouth now claims in its 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. 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 a part of the informal dispute resolution letter. 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.

8. In its Motion, BellSouth cites to Rule 28.106.204 as the rule authorizing this motion. However, the applicable rules of administrative procedure do not provide for the filing of counterclaims in a docket such as this. Chapter 28-106 of the Florida Administrative Code ("Decisions Determining Substantial Interests") sets forth the applicable procedural rules.

Additionally, 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"). Nothing in any of those rules authorize the filing of counterclaims .

9. Rule 28-106.201, F.A.C., covers petitions and the filing of petitions and Rule 28-106.202, F.A.C., allows for an amendment to petitions. Petitions may be amended by right before the designation of a presiding officer, or, with leave of the presiding officer after such designation. BellSouth is not seeking to amend a petition but to amend an answer. Unlike the Rules of Civil Procedure which require an answer to a pleading, or risk default. Rule 28-106.203, F.A.C., permits, but does not require a respondent to file an answer. The only reference to the Florida Rules of Civil Procedure in any of the relevant administrative code sections, can be found in Rule 28-106.206, F.A.C., which provides that the parties may obtain discovery through the means and in the manner set forth in Rules 1.280 through 1.400 of the Florida Rules of Civil Procedure. The expressed inclusion of these specific procedural rules into the Florida Administrative Code, indicates an intention to exclude the remaining Florida Rules of Civil Procedure. BellSouth's reliance on Fla.R.Civ.P. 1.190 in support of its Motion is misplaced.

10. Even if Fla.R.Civ.P. 1.190 applied to this proceeding, the applicable case law interpreting that rule state that amendments to pleadings 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). In this situation, for numerous reasons, IDS will be prejudiced by the inclusion of BellSouth's counterclaim.

11. First, BellSouth did not file the Motion until after the issue identification conference and after this Commission entered its Order Establishing Procedure ordering direct testimonies to be filed by July 22, 2004, and setting this matter for a one day evidentiary hearing on October 14, 2004. Prior to this scheduling order, the scope of this proceeding was essentially limited to one dispute. BellSouth has now sought to inject three more disputes into this proceeding, thereby multiplying the scope of this docket by four times. 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. Although, the time for hearing need not be four days, more likely than not the parties will need at least two to three days for hearing. Accordingly, unless the current schedule is modified, IDS will clearly suffer prejudice by allowing the inclusion of any such new issues.

12. Second, two of the issues BellSouth seeks to introduce involve issues common to all CLECs. The first is BellSouth's refusal to true-up interim DUF rates to the final Florida rates set in the UNE dockets. This issue is at the crux of BellSouth's Count I of its proposed counterclaim. 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. 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 agreement during the relevant time period (i.e. 1999 through 2002). 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. 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.

13. 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 DS0 UNE-P combinations, where an end-user has four or more total lines. There also exists questions regarding BellSouth's inability to provide DS0 EELs during the relevant time period, and whether 271 pricing would be implicated after BellSouth received such approvals. 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. To address these issues, this Commission must interpret a variety of prior FCC opinions and rules; which apply to all CLECs in this state. Like the DUF issue, these issues would be better litigated in a generic proceeding wherein all CLECs have the right to comment.

14. 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. 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 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.

15. The last new issue BellSouth which seeks to introduce into this docket, involves a BellSouth request for a deposit from IDS. This issue was never even addressed in the November 2003 seeking informal dispute resolution, and BellSouth only began demanding a deposit after

IDS sent that November 2003 letter to this Commission. BellSouth has not and cannot give any true justification for waiting so long to attempt to bring in this issue in this docket. 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. Indeed, BellSouth has already indicated that it may take unilateral action under the interconnection agreement to terminate services to IDS if this Commission does not resolve the deposit issue within sixty (60) days. See BellSouth's proposed counterclaim, at paragraph 42 (Count IV) wherein BellSouth reserves the right to discontinue service under paragraph 1.8 of Attachment 7 if the docket is not resolved in sixty (60) days; and Exhibit "A" to the proposed counterclaim, at Paragraph 1.8 of Attachment 7 to the interconnection agreement.

16. 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. Moreover, it would not be possible to keep such a schedule with the current issues already in this docket. IDS has absolutely no control over the Commission calendar and, BellSouth threatens extreme prejudice to IDS by expanding the scope of this docket by four-times, while at the same time threatening to take unilateral action to shut off service to IDS, unless this docket is concluded within sixty days after allowance of its counterclaim (i.e. approximately August 2004).

17. None of BellSouth's proposed counterclaims would even remotely be considered compulsory in a court proceeding. Even BellSouth admits that its counterclaims raise issues that are new and distinct from those issues raised in IDS' petition and amended petition. 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.



18. Finally, including the deposit issue in this proceeding will only cause severe prejudice to IDS and is simply unfair.

WHEREFORE, for the reasons stated above, Petitioner IDS Telcom, LLC, respectfully requests that this Commission deny BellSouth Telecommunications, Inc.' Motion For Leave To Amend Answer To Assert Counterclaim.

Respectfully submitted,

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s/ Norman H. Horton, Jr.  
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Attorneys for IDS Telcom, LLC

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing has been served upon the following parties by E-Mail and Facsimile this 14<sup>th</sup> day of May, 2004.

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s/ Norman H. Horton, Jr.  
Norman H. Horton, Jr.