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July 15, 2004

BY HAND DELIVERY

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

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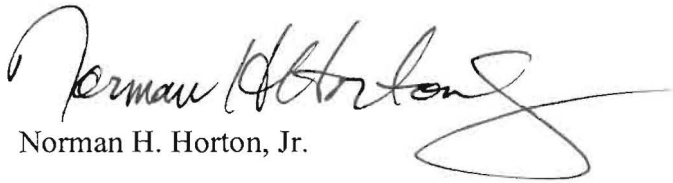
Re: Docket 040488-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of IDS Telcom, LLC is an original and fifteen copies of Respondent IDS' Response and Opposition to Petitioner BellSouth's Motion to Strike Portions of IDS' Brief Regarding BellSouth's Complaint to Enforce Deposit Requirements in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,


Norman H. Horton, Jr.

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Enclosures
cc: Mr. Angel Leiro

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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: July 15, 2004
_____)	

**RESPONDENT IDS' REPSONSE AND OPPOSITION
 TO PETITIONER BELLSOUTH'S MOTION TO STRIKE
 PORTIONS OF IDS' BRIEF REGARDING BELLSOUTH'S
COMPLAINT TO ENFORCE DEPOSIT REQUIREMENTS**

RESPONDENT IDS TELCOM, LLC ("IDS"), by and through its undersigned counsel, hereby files this Response and Opposition To Petitioner BellSouth's Motion To Strike Portions Of IDS' Brief Regarding BellSouth's Complaint To Enforce Deposit Requirements, and in support thereof states as follows:

1. On or about May 21, 2004, the Petitioner BellSouth Telecommunications, Inc. ("BellSouth") initiated this docket seeking to have this Commission enter an order requiring IDS to post a security deposit of \$4.6 million.

2. On or about June 29, 2004, IDS filed its Brief Regarding BellSouth's Complaint To Enforce Deposit Requirements ("Deposit Brief"). In its Deposit Brief, IDS related discussions between representatives of BellSouth and IDS relating to BellSouth's practices regarding deposits, including BellSouth's practice of allowing CLECs to build up deposits over time and BellSouth allowing the use of alternative forms of security. IDS also argued that if a security deposit was required: (a) the lack of any specific time period in the interconnection agreement over which to post a deposit; and (b) the non-discriminatory requirements of the interconnection agreement and the Telecom Act; both required BellSouth to allow IDS an opportunity to build-up a security deposit over time. Furthermore the non-discriminatory requirements of the

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interconnection agreement and the Telecom Act, both required BellSouth to allow IDS the opportunity to post alternative security.

3. On or about July 7, 2004, BellSouth filed its Motion To Strike Portions Of IDS Telecom, LLC's Brief Regarding BellSouth's Complaint To Enforce Deposit Requirements ("Motion to Strike"). In its Motion to Strike, BellSouth claims that: "IDS on several occasions referenced the existence and the substance of confidential settlement discussions held with BellSouth on this matter." See paragraph 1 of BellSouth's Motion to Strike. BellSouth also claims that Rule (sic) 90.408 of the Florida Evidence Code precludes the alleged references.

4. First, and foremost, IDS states that there never was any agreement between IDS and BellSouth regarding confidentiality of discussions relating to the deposit issue. Moreover, BellSouth's Motion to Strike does not state or even contend that the parties ever agreed that discussions relating to the deposit issues were confidential.

5. Second, the sequence of discussions and relevant factual background of these issues is important. In December 2003, IDS initiated Docket No. 031125-TP as a result of BellSouth denying IDS access to LENS over a dispute regarding the amount of money to be paid under a prior 2001 Settlement Agreement. The parties had agreed to a settlement amount that was to be transferred to a special "Q Account." A dispute arose when BellSouth claimed that IDS orally agreed to pay more than the amount BellSouth was supposed to transfer to the settlement "Q Account." After access to LENS was restored, the parties attempted to resolve not only the settlement "Q Account" issue, but also other billing disputes between the parties and BellSouth's deposit request. These discussions between the parties occurred primarily in the March 2004 to

April 2004 time frame; before this docket was even filed. On May 7, 2004, BellSouth sought to file counterclaims in Docket No. 031125-TP to include the deposit issues. BellSouth later withdrew such issues from its motion to file counterclaims, and on or about May 21, 2004 filed this docket. The discussions referenced in IDS' Deposit Brief occurred prior to May 7, 2004 (when BellSouth first sought to raise the deposit issue with this Commission).

6. BellSouth's Motion to Strike contends that Section 90.408 of the Florida Evidence Code prohibits IDS' reference to such discussions. BellSouth's arguments are misplaced for several reasons. First, the parties never agreed to consider their deposit discussions confidential, and even BellSouth does not contend otherwise. Second, Section 90.408 may not apply to these administrative proceedings, and even assuming it does, the discussions did not relate directly to the settlement of this docket and IDS is not attempting to use the discussions to establish either liability, the absence of liability, or amount. Therefore, such conversations would fall outside the scope of the statute. More importantly however, is that the discussions would be allowed under Section 120.569, Florida Statutes.

7. Section 120.569(2)(g), Florida Statutes, governs the admission and use of evidence in administrative proceedings and provides as follows:

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.

Evidence . . . "commonly relied upon by reasonably prudent persons," includes representations by one party to another, and thus the parties' discussions on the deposit issue certainly fall into

this category of evidence which is admissible in this proceeding, but which might not be admissible in a Florida court. Thus, Section 90.408 appears to be inapplicable in this instance.

8. Moreover, even if Section 90.408, Florida Statutes, applied in these proceedings, it would still not bar the referenced communications. Section 90.408, Florida Statutes, states as follows:

“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 claim or its value.”

A plain reading of Section 90.408, Florida Statutes, requires negotiations concerning the compromise of an existing claim. Many of the discussions between IDS and BellSouth during the March/April 2004 time period were attempts to gain information regarding each party's position, and thus would not properly be considered "negotiations concerning a compromise." See Southeast Capital Investment Corp. v. Albemarle Hotel, Inc., 550 So.2d 49, 52 (Fla. 2d 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). In this case, the discussions recounted do not constitute "negotiations concerning a compromise" and thus are not covered by Section 90.408, Florida Statutes.

9. Moreover, Florida Courts interpreting Section 90.408, Florida Statutes, have held that the statute only applies to negotiations regarding claims in an existing lawsuit, and that the negotiations must relate to the actual existing claim being settled. 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). In this case, during the parties' discussions the only litigation pending dealt with the settlement of the "Q Account" and not with the deposit issue. Moreover, any "settlement negotiations" which may have occurred, could only have related to settling the "Q Account" dispute in Docket No. 031125-TP, and thus are not precluded in this docket under Section 90.408, Florida Statutes.

10. Furthermore, under Section 90.408, Florida Statutes, the negotiations must relate to an actual lawsuit that has already been filed. See H.R.L. 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 documents drafted prior to the lawsuit being filed were not inadmissible). Since this docket had not yet even been filed when the discussions took place, BellSouth's contentions are erroneous. Because this docket had not yet even been filed at the time of the parties' discussions, Section 90.408, Florida Statutes, does not prohibit IDS' from referencing any such prior conversations between the parties.

11. 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 Fla.Stat. Sec. 90.408. In Wolowitz v. Thoroughbred Motors, Inc., 765 So.2d 920, 925 (Fla. 2d DCA 2000), the court of appeals stated as follows:

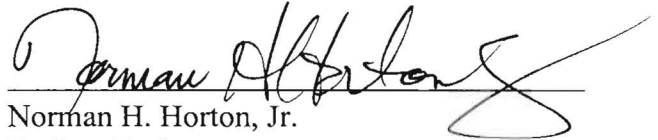
"Section 90.408 excludes evidence of settlement negotiations only when the evidence is offered to prove liability, the absence of liability, or value. Thus evidence of settlement negotiations is admissible to establish other relevant facts. *See* William R. Eleazer & Glen Weissenberger, *Florida Evidence* 209 (1998 ed.) To the extent that the 'contract confirmation' addresses issues other than liability or value, it would not necessarily be excluded under section 90.408."

See also 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). In this situation, none of the discussions referenced by BellSouth were used by IDS on the issue of liability (i.e. any BellSouth right to have IDS post a deposit or security) or value (i.e. the amount of any required deposit or security). Rather, the discussions are only relevant to the time period under which IDS may have in order to build up any posted deposit, and any alternative form of security which may be posted. Since none of the discussions between the parties referenced in the Deposit Brief relate 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.

Accordingly, for the reasons set forth above, BellSouth' Motion to Strike should be denied in its entirety.

WHEREFORE, Respondent IDS Telcom, LLC, hereby files this Response and Opposition To Petitioner BellSouth's Motion To Strike Portions Of IDS' Brief Regarding BellSouth's Complaint To Enforce Deposit Requirements, and respectfully requests that this Commission deny such motion.

Respectfully submitted,



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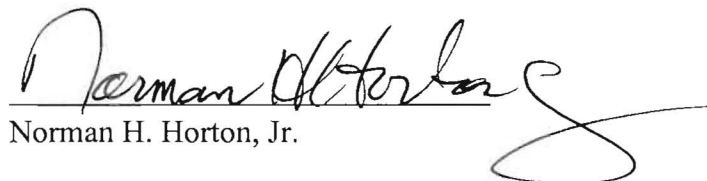
Attorneys for IDS Telcom, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing has been served upon the following parties by Electronic Mail this 15th day of July, 2004.

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