BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for approval of amendment to interconnection, unbundling, resale, and collocation agreement between IDS Telcom LLC and BellSouth Telecommunications, Inc.	)	Docket No. 040611-TP Filed: July 22, 2004

RESPONSE OF IDS TELCOM, LLC. TO BELLSOUTH'S REQUEST FOR DISMISSAL, SANCTIONS, AND EVIDENTIARY HEARING

IDS Telcom, LLC., ("IDS"), through its undersigned counsel, hereby responds to the request by BellSouth Telecommunications, Inc.'s ("BellSouth") that the Commission dismiss the Request for Approval of the Amendment to Interconnection Agreement filed by IDS on June 25, 2004, and/or impose sanctions on IDS[1], and states:

BACKGROUND

1. Section 252(i) of the Telecommunications Act of 1996 ("1996 Act") provides:

> A local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under this section, to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

2. Pursuant to an interconnection agreement ("ICA") between BellSouth and Supra Telecommunications & Information Systems, Inc. ("Supra"), BellSouth provides services, including interconnection and unbundled network elements, to Supra without imposing any requirement of a deposit.

3. With respect to the subject of deposit, IDS informed BellSouth that IDS invokes its legal right under Section 252(i) of the 1996 Act to obtain services from BellSouth under the

[1] BellSouth's requests for dismissal and for sanctions are contained in its "Opposition to Request for Approval of Amendment to Interconnection Agreement," which BellSouth filed on July 15, 2004. IDS responds to the extent the Commission treats BellSouth's pleading as a Motion to Dismiss or a Motion for Sanctions. IDS also responds to BellSouth's request for an evidentiary hearing.

same terms and conditions that BellSouth provides them to Supra - - that is, with no deposit requirement.

4. IDS attempted to obtain the cooperation of BellSouth in the preparation of an amendment adopting the terms and conditions of the BellSouth - Supra agreement as they relate to the requirement of a deposit. BellSouth refused to cooperate.

5. On June 25, 2004, IDS unilaterally submitted a Request for Approval of Amendment. The purpose of the Request for Approval of Amendment is to establish between IDS and BellSouth, with respect to the subject of a deposit, the same terms under which BellSouth provides interconnection and services to Supra. Specifically, to adopt and mirror the BellSouth – Supra agreement in this regard, in its amendment of June 25, 2004 IDS deleted from the existing ICA between IDS and BellSouth (a) Section 2.3 of Attachment 1; (b) Section 1.8 of Attachment 7; and (c) the words "security deposits" in the first sentence of Section 1.9 of attachment 7. The effect is to eliminate the requirement of a deposit from the ICA.

6. In the introductory portion of the amendment, IDS stated, conspicuously:

> WHEREAS for the State of Florida IDS seeks to adopt the deposit provisions/requirements of the BellSouth/Supra Agreement:

7. Equally conspicuously, on the signature page IDS noted, "Signed by IDS Telcom, LLC. on behalf of BellSouth Telecommunications, Inc., in accordance with the Agreement and 47 USC Section 252."

BELLSOUTH'S PLEADING

8. On July 15, 2004, BellSouth filed its Opposition to Request for Approval of Amendment to Interconnection Agreement (herein, "BellSouth's Opposition"). Within its pleading, BellSouth asserts the Commission should "immediately dismiss IDS' request and

sanction IDS." BellSouth's Opposition at page 1. BellSouth offers the following "grounds" in support of its requests:

(a) BellSouth did not consent to, and did not execute, the Amendment.

(b) IDS's unilateral filing is prohibited by the Agreement.

(c) IDS is attempting to "adopt away" its deposit obligations in violation of Section 251 of the 1996 Act by seeking to adopt the "deposit provisions" of an agreement that is devoid of any deposit language.

(d) IDS's adoption request is deficient because it does not seek to adopt an "interconnection service or network element" from another agreement.

(e) The Commission rejected a similar adoption amendment in Order No. PSC-03-0249-PAA-TP.

BellSouth also requests an evidentiary hearing on IDS's amendment.

ARGUMENT

9. In its pleading, BellSouth has supported neither its demand for dismissal nor its request for sanctions. Nor has BellSouth demonstrated a basis for an evidentiary hearing.

10. While not labeled as such, essentially BellSouth asks the Commission to treat its pleading as a Motion to Dismiss. The function of a Motion to Dismiss is to test the legal sufficiency of a complaint (or, in this instance, a request for approval of an amendment to which IDS asserts it is entitled by law) to state a cause of action for which the Commission could frame relief. The legal standard that governs a request for dismissal is well established. In gauging the sufficiency of IDS' request for approval of the amendment, the Commission must confine its consideration to the four corners of IDS' pleading. For purposes of BellSouth's request for dismissal, the Commission must take as true the matters asserted by IDS. When evaluating the request for dismissal, the Commission must not consider any affirmative defenses or evidence that BellSouth may offer in opposition to IDS's Request for Approval of Adoption. *Varnes v.*

Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); Order No. PSC-03-1331-FOF-TL, Docket Nos. 030867-TL, 030868-TL, and 030869-TL (November 21, 2003). A review of BellSouth's pleading demonstrates clearly that its arguments relate to the *merits* of IDS's filing, and not to the test that governs a request for dismissal.

11. IDS freely acknowledges that BellSouth did not consent to and did not execute the amendment that IDS filed on June 25, 2004. More to the point, BellSouth *refused* to do so[2]. BellSouth's recalcitrance compelled IDS to file the amendment unilaterally[3]. The question that IDS' filing presents is whether BellSouth may frustrate a CLEC's decision to exercise its right to invoke Section 252(i) simply by refusing to participate in a joint filing. Obviously, the answer is "no." If the rights afforded CLECs by Section 252(i) are to have any meaning, CLECs must have the ability to proceed without the ILEC when the ILEC refuses to cooperate in the adoption process. While IDS would have preferred a cooperative endeavor - - and indeed worked toward that end - - IDS was forced to take unilateral action to protect and enforce its legal rights when BellSouth balked.

12. BellSouth contends that IDS's filing is prohibited by the parties' ICA. To the contrary, as stated in the introductory portion of the amendment, Paragraph 13 of the ICA explicitly preserves, for the benefit of IDS, BellSouth's obligation under Section 252 and applicable regulations. BellSouth argues that the ICA requires both parties' signatures on any amendment, and that IDS' only remedy, in the event BellSouth refuses to participate in an adoption under Section 252(i), is to file a complaint with the Commission. However, IDS' rights under the 1996 Act cannot be defeated so easily. When read in *pari materia* with Paragraph 13, it is clear that the "amendment" and "dispute resolution" clauses cited by BellSouth relate - - not

[2] In this regard the correspondence attached to BellSouth's pleading makes IDS's case.
[3] Within the document, IDS noted that IDS had signed for BellSouth, and IDS served a copy of the filing on BellSouth. Accordingly, BellSouth's somewhat frenetic claim that IDS "forged" BellSouth's signature is preposterous.

to a situation in which IDS is exercising its rights under Section 252(i) - - but to situations in which the parties either have negotiated an amendment to their own agreement or disagreed as to how their existing agreement should be interpreted or implemented. Otherwise, BellSouth's overreaching interpretation of these clauses would gut and render meaningless the provision of the ICA that was designed specifically to protect IDS' rights under Section 252(i) of the 1996 Act.

13. In its pleading, BellSouth contends that IDS can not avail itself of the same terms offered to Supra because the BellSouth-Supra ICA is "devoid of any deposit language". IDS's objective is to achieve the same contractual relationship regarding terms and conditions, as they relate to deposit requirements. If the interconnection agreement that IDS wishes to adopt stated, "Under no circumstances shall BellSouth require the CLEC to post a deposit of any amount," there would be no issue concerning IDS's ability to adopt that provision. The fact that BellSouth established such a contractual relationship with another CLEC through an *absence* of any stated requirement cannot defeat IDS' right to the identical terms and conditions regarding deposits - - even if, in order to parallel the other contractual relationship, the adoption results in a contract that is "devoid" of any mention of a deposit. To hold otherwise would enable an ILEC to circumvent the "pick and choose" rule that governs IDS' filing and discriminate in favor of a particular CLEC through the expedient of omitting from one agreement terms and conditions that it places in all others[4].

14. BellSouth asserts that IDS' adoption/amendment must fail because a deposit is not an "interconnection, service or unbundled element." BellSouth fails to account for all of the

[4] For reasons developed below, the current "pick and choose" rule governs IDS's filing, notwithstanding the FCC's recent move to replace it in the future with an "all or nothing" approach to the implementation of Section 252 (i).

statutory language that defines the parameters of its obligation under Section 252(i). The full provision states:

> "A local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved *under this section*, to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions as those provided in the agreement*."

15. The obligation imposed by Section 252(i) is not only to make the same services and elements available - - but to make them *available upon the same terms and conditions.* The provision of services and elements either with or without the requirement of a deposit constitutes the provision of "services and network elements" pursuant to "terms and conditions."

16. In its pleading, BellSouth anticipated correctly that IDS would cite the FCC's declaratory ruling in WC Docket No. 02-89[5] to support its position. In that order, the FCC concluded that the obligation to file agreements for approval extends to all agreements relating to an ongoing obligation to provide interconnection, services, and network elements, including provisions relating to administrative terms and conditions.. At page 6, BellSouth argues that the order is not germane to the scope of Section 252(i) because it relates to the identification of the agreements that must be submitted for approval, as opposed to those that are available to be adopted. Again, for its purposes BellSouth artificially and self-servingly truncates the statutory language it brings to bear on the issue. Section 252(i) provides clearly that the scope of the right to adopt terms and conditions is coextensive with agreements approved "*under this section"* (see highlighted language above*)*. By delineating in the Qwest declaratory order the scope of the agreements that must be approved under Section 252(i), the FCC simultaneously delineated a *corresponding* scope of terms and conditions available for adoption pursuant to Section 252(i).

[5]Order No. 02-276*, In the Matter of Qwest Communications International Inc. petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1).*

Therefore, if an agreement must be submitted for approval under Section 252(i), it necessarily follows that a local exchange carrier must make the provisions of that approved agreement available to any other carrier upon the same terms and conditions.

17. BellSouth cites Order No. PSC-03-0249-PAA-TP, issued on February 20, 2003 in Docket No. 021069-TP, as precedent that supports its request. In that order, the Commission proposed to deny Supra's request to adopt certain billing dispute resolution language contained in the BellSouth/Nuvox ICA. However, a review of the file in Docket No. 021069-TP reveals significant differences in circumstances that distinguish that case from IDS' amendment. For instance, in Docket No. 021069 BellSouth asserted that Supra was attempting to lift from another ICA a provision that related solely to *resale* and insert it into the "general provisions" of its ICA in a manner that would broaden its applicability. In other words, in that case BellSouth accused the CLEC of attempting to alter the original scope of the provision being adopted. There is no similar argument of change in context here. Clearly, Docket No. 021069 involved unusual and complicating factual circumstances, and the decision to issue a PAA proposing to deny the adoption under those facts serves as no precedent here.

18. BellSouth requests an evidentiary hearing on its opposition to the adoption. Fundamentally, an evidentiary hearing is appropriate only where there is a factual dispute. See Sections 120.569 and 120.57, Florida Statutes. IDS' assertion that it is entitled under Section 252 (i) of the 1996 Act to an ICA that, like the one between Supra and BellSouth, imposes no deposit requirement, and BellSouth's opposition to that assertion, present a pure question of law. In support of its request for a hearing, BellSouth says only that an evidentiary hearing should be held because IDS's filing is "egregious" and BellSouth "vehemently opposes" the amendment. (BellSouth's Opposition, at page 1). Neither BellSouth's argumentative characterization of IDS'

filing (which IDS has refuted herein) nor the purported depth of feeling underlying BellSouth's opposition to the adoption establishes a factual dispute that warrants an evidentiary hearing.

19. BellSouth's vague request for sanctions is similarly without any basis. In support of this request, BellSouth asserts only that IDS' filing is "frivolous" and is "devoid of any factual or legal basis in support" (BellSouth's opposition, at page 8.) On the contrary, IDS has shown both factual and legal bases for its filing. Legally, IDS is entitled to receive services and network elements upon the same terms and conditions that BellSouth provides them to another CLEC. Factually, BellSouth has been dilatory and obstructionist with respect to meeting its obligations in that regard-- facts that are demonstrated by the attachments to BellSouth's own pleading. IDS' filing was precipitated by BellSouth's refusal to cooperate with IDS in the preparation of a joint filing. Of necessity, IDS took action to protect its interests, being careful to apprise BellSouth as it did so. The Commission should disregard BellSouth's unsupported demand for sanctions.

20. Finally, BellSouth refers to FCC Order 04-164, issued in In re: Review of Section 251 Unbundling Obligations of incumbent Local Exchange Carriers, Second Report and Order, CC Docket No. 01-338 on July 13, 2004. In its pleading, BellSouth argues that this order "clarifies" that a CLEC cannot select portions of another interconnection agreement, but must elect to adopt it in total or not at all. Here, BellSouth badly mischaracterizes FCC Order 04-164. In this order the FCC did not "clarify" Section 252(i), as BellSouth claims. Instead, the FCC moved to *replace* a legitimate, valid implementation of Section 252(i) the "pick and choose" regime that was and is in effect - - with another implementation that the FCC regards as permissible notwithstanding its differences, the "all-or-nothing" rule - - prospectively, *when the order becomes effective.* The order has *not* become effective, and will not become effective until

30 days after it has been published in the Federal Register. On the other hand, the "pick and choose" rule was valid and in effect on June 25, 2004, when IDS filed its Request for Approval of Adoption. Accordingly, IDS's filing is governed by the "pick and choose" rule, and FCC Order 04-164 has no application to IDS's Request for Approval of Adoption.

CONCLUSION

The Commission should reject BellSouth's requests for dismissal and for sanctions. The Commission should also reject the request for an evidentiary hearing, and proceed to rule on the issue of law presented by the parties' pleadings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response of IDS Telcom, LLC., to BellSouth's Request for Dismissal, Sanctions, and Evidentiary Hearing has been served upon the following parties by electronic mail and by U.S. Mail this 22nd day of July, 2004.

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