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PLEASE REPLY TO:  
TALLAHASSEE

TALLAHASSEE OFFICE  
117 SOUTH GADSDEN  
TALLAHASSEE, FLORIDA 32301  
(850) 222-2525  
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September 13, 2004

**VIA HAND DELIVERY**

Ms. Blanca S. Bayo  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 040488-TP

Dear Ms. Bayo:

On behalf of IDS Telcom, LLC, enclosed for filing and distribution please find the original and fifteen copies of:

- IDS Telcom, LLC's Protest of Proposed Agency Action Order No. PSC-04-0824-PAA-TP

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

*Vicki Gordon Kaufman*  
Vicki Gordon Kaufman

CMP \_\_\_\_\_  
 COM 5  
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 ECR \_\_\_\_\_ Enclosures  
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DOCUMENT NUMBER-DATE

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A.

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FPSC-COMMISSION CLERK

*ok m/s/ky*

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint against BellSouth  
Telecommunications, Inc., against IDS  
Telcom, LLC to enforce interconnection  
agreement deposit requirements

Docket No. 040488-TP  
Filed: September 13, 2004

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**IDS TELCOM, LLC'S PROTEST OF PROPOSED AGENCY ACTION  
ORDER NO. PSC-04-0824-PAA-TP**

IDS Telcom, LLC (IDS) files this protest of and request for formal proceedings on those portions of Order No. PSC-04-0824-PAA-TP requiring IDS to provide a \$3.9 million deposit to BellSouth Telecommunications, Inc. (BellSouth). As grounds therefore, IDS states:

**INTRODUCTION**

1. The name and address of the affected agency is:

Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

The agency's file number is Docket No. 040488-TP. IDS received a copy of the Commission's order via fax on August 23, 2004.

2. The name and address of the Petitioner is:

IDS Telcom, LLC  
1225 NW 167 Street, Suite 200  
Miami, Florida 3333169

3. The name and address of Petitioner's representatives for purposes of service during this proceeding are:

Vicki Gordon Kaufman  
vkaufman@mac-law.com  
Joseph A. McGlothlin  
jcmglothlin@mac-law.com  
McWhirter Reeves McGlothlin  
Davidson Kaufman & Arnold, PA  
117 South Gadsden Street

Tallahassee, FL 32301  
850-222-2525  
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### STATEMENT OF SUBSTANTIAL INTERESTS

4. IDS is a CLEC doing business in the state of Florida. It has an Interconnection Agreement (ICA) with BellSouth.

5. BellSouth filed a Complaint on May 21, 2004 in which it asserted that it was entitled to a \$4.6 million deposit from IDS. IDS responded to the Complaint and stated that BellSouth had failed to meet the requirements for a deposit. In addition, IDS filed 9 Affirmative Defenses and a Counterclaim regarding BellSouth's refusal to comply with the amendment and adoption provisions of the parties' ICA. The Commission considered the matter at the August 3, 2004 Agenda Conference. At the Agenda Conference, counsel for BellSouth indicated that the \$2 million deposit Staff recommended would be acceptable to BellSouth.

6. On August 23, 2004, the Commission issued Proposed Agency Action Order No. PSC-04-0824-PAA-TP (PAA Order). In the PAA Order, the Commission ordered IDS to provide a deposit to BellSouth under the following terms:

IDS shall be required to pay \$1 million initially to BellSouth, followed by payments of \$200,000 per month until \$2 million has been paid. Thereafter, IDS shall have the option of paying \$200,000 per month until the remaining deposit of 1.9 million is paid, or presenting a corporate guarantee for the remaining deposit of 1.9 million. The deposit payments including any corporate guarantee shall be made to BellSouth. BellSouth shall maintain the deposit subject to refund with interest. The first payment of \$1 million is due 10 days after the issuance date of this Order. The additional payments are due on the 10<sup>th</sup> of each month. IDS shall be considered in default if the payment is not received by BellSouth on the 25<sup>th</sup> of each month.<sup>1</sup>

That a portion of the deposit may be in the form of a corporate guarantee does not alter the fact that it is a deposit of \$3.9 million, almost twice the Staff's recommended amount and nearly

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<sup>1</sup> Order No. PSC-04-0824-PAA-TP at 9-10, footnote omitted.

twice the amount acceptable to BellSouth. The Commission arrived at this amount without providing IDS the basic due process rights to which it is entitled. There was no evidentiary basis for the deposit amount, as the Commission did not conduct an evidentiary hearing. IDS has disputed the deposit amount<sup>2</sup> and it is entitled to a resolution of its claims on the merits through the hearing process *before* the imposition of a deposit.

7. The PAA Order also denied IDS' counterclaim and stated that language in another CLEC ICA that IDS adopted had no "retroactive application" and thus, "no direct impact on the current [deposit] dispute."<sup>3</sup> Through this pronouncement the Commission improperly and prematurely made a finding in this matter that prejudices the issues in another docket (Docket No. 040611-TP), requiring IDS to protest the PAA Order so as to protect its interests in this separate docket.

8. The PAA Order requires IDS to give BellSouth a \$3.9 million deposit, an amount far greater than even the amount acceptable to BellSouth. IDS suggests that the manner in which the deposit amount was "calculated" at the Agenda Conference was arbitrary and capricious, particularly in light of BellSouth's acceptance of approximately half the amount ordered, the Staff recommendation of approximately half the amount ordered, the many factual issues IDS raised, and the lack of any evidentiary foundation for the decision.

9. The requirement to tender a deposit in such a large amount affects IDS' substantial interests. Pursuant to Chapter 120, Florida Statutes, IDS is entitled to a hearing on this issue *before* being required to provide a deposit of this magnitude. Further, the Commission has no authority to order such a deposit prior to an evidentiary hearing on the disputed issues of material fact IDS has raised.

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<sup>2</sup> Pursuant to section 120.80(13), Florida Statutes, IDS does not dispute the timing or the rate of the required deposit payments. It disputes only the amount of the deposit required.

<sup>3</sup> *Id.* at 10.

10. The PAA Order also denies IDS' counterclaim regarding the adoption of the billing and deposit provisions from another ICA. The Commission's failure to find the adoption appropriate and effective at the time it was made affects IDS' substantial interests as well.

11. The Commission's PAA Order is in contravention of the parties' ICA, as well as state and federal law. The Commission's decision affects IDS' substantial interests and IDS must protest the amount of the deposit ordered so as to fully protect those interests.

12. IDS recognizes that at the Agenda Conference at which this matter was discussed, the Commission indicated that IDS should be required to provide a deposit in the amount of \$3.9 million or face disconnection, regardless of the issuance of a PAA Order in this case. IDS respectfully submits that the requirement that a deposit be made or that BellSouth would be justified in disconnecting service to IDS *before* an evidentiary hearing is held on the merits of the case is a clear deprivation of IDS' due process rights and contrary to Florida administrative law.

13. When a party's substantial interests are affected by action an agency proposes to take (in this case, the requirement for a multi-million dollar deposit), section 120.57(1)(c), Florida Statutes, provides that the party "shall have the opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of fact and orders...." IDS has raised disputed issues of material fact which require the protections delineated above and require the Commission to conduct an evidentiary hearing *before* taking action affecting IDS' substantial interests. The fact that IDS may receive its money back at some future date (even with interest) does not mitigate its inability to access those funds now or blunt in any way the affect the Commission's decision has on IDS' substantial interests.

14. Further, this Commission has often held that when a PAA order is protested, the action proposed therein becomes a nullity. See Order No. PSC-95-0862-FOF-TI (“A protest to a proposed agency action renders the action void...”). The Commission has ignored this legal precept by requiring IDS to provide a deposit *before* resolution of the disputed issues.

15. IDS also respectfully suggests that this situation is entirely different than the interim rate situation referenced at the Agenda Conference. The interim rate provisions are authorized by statute in the context of a rate case.<sup>4</sup> There is no statutory authority for the action the Commission took in this matter, and in fact, as discussed above, such action is in conflict with the Florida Administrative Procedures Act and fundamental due process requirements.

16. Nonetheless, under protest, subject to IDS’ opportunity to prove that the deposit amount ordered is unreasonably high, and, under threat of disconnection, IDS will provide the deposit as ordered by the Commission and requests that the Commission expeditiously resolve this matter.

#### **DISPUTED ISSUES OF MATERIAL FACT**

17. Disputed issues of material fact include, but are not limited to, the following:

- a. Whether the amount of the deposit set out in the PAA Order is reasonable and comports with the requirements of the parties’ ICA and state and federal law;
- b. Whether BellSouth’s deposit policies are applied to CLECs in a non-discriminatory manner;
- c. Whether BellSouth breached the covenant of good faith and fair dealing in regard to the deposit it sought from IDS;
- d. Whether IDS has taken all action necessary to adopt the billing and deposit provisions of another agreement.

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<sup>4</sup> See, i.e., §§ 366.071, 367.082, Florida Statutes.

## **ULTIMATE FACTS ALLEGED**

18. Ultimate facts alleged include, but are not limited to, the following:
- a. The amount of the deposit imposed in the PAA Order is unreasonable, in contravention of the parties' ICA, violative of state and federal law, and much higher than even the amount found acceptable by BellSouth;
  - b. BellSouth does not apply its deposit policies in a non-discriminatory manner;
  - c. BellSouth's deposit request is anticompetitive;
  - d. IDS has appropriately adopted the billing and deposit provisions from the ICA of another CLEC and such provisions are currently effective.<sup>5</sup>

## **STATUTES AND RULES REQUIRING REVERSAL OF THE AGENCY'S DECISION**

19. The statutes and rules entitling IDS to relief include, but are not limited to the following:
- a. Section 364.01, Florida Statutes;
  - b. Sections 120.568 and 120.57, Florida Statutes;
  - c. 47 USC § 252(i);
  - d. Rules 25-22.036 and 106.201, Florida Administrative Code.

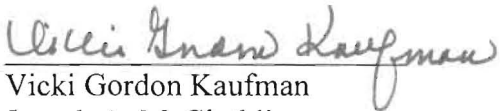
## **RELIEF SOUGHT**

20. IDS requests that the Commission take the following action:
- a. Find that IDS is not required to provide a deposit to BellSouth in the amount set out in the PAA Order;

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<sup>5</sup> This adoption matter is currently at issue in Docket No. 040611-TP. However, IDS raises it here as the Commission's statement in the PAA Order has the potential to prejudice the Commission's decision in Docket No. 040611-TP.

- b. Acknowledge IDS' adoption of the billing language from the Supra ICA as effective on the date IDS adopted the language;
- c. Schedule this matter for an evidentiary hearing;
- d. Grant such other relief as necessary.



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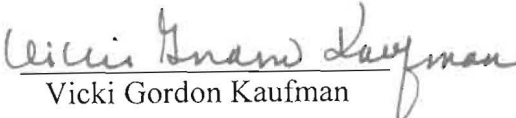


## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing IDS Telcom, LLC's Protest of Proposed Agency Action Order No. PSC-04-0824-PAA-TP has been served upon the following parties by (\*) hand delivery and U.S. Mail this 13<sup>th</sup> day of September 2004:

(\*)Patricia Christensen  
Office of General Counsel  
Room 370 Gunter Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399

(\*)James Meza, III  
Nancy B. White  
c/o Ms. Nancy H. Sims  
BellSouth Telecommunications, Inc.  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301-1556

  
Vicki Gordon Kaufman