

ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint Petition of MCG Capital Corporation,	:	Docket No.: 050111-TP
IDS Telcom Corp., and IDS Telcom LLC for	:	Issued: March 4, 2005
Approval for Name Change and Transfer of CLEC	:	File: March 11, 2005
Certificate No. 5228 from IDS Telcom LLC to	:	
IDS Telcom Corp.; for Waiver of Rule 25-4.118,	:	
F.A.C., Local, Local Toll, or Toll Provider	:	
Selection in Connection with the Sale of Customer-	:	
Based and Other Assets from IDS Telcom LLC to	:	
IDS Telcom Corp.; for Acknowledgement of	:	
Registration of IDS Telcom Corp. as Intrastate	:	
Interexchange Telecommunications Company	:	
Effective February 8, 2005.	:	

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 COMMISSION
 CLERK

PETITION FOR A FORMAL PROCEEDING AND OBJECTION TO APPLICATION

Petitioner, PHYLLIS HEIFFER ("Heiffer"), by and through her undersigned counsel, files this Petition seeking a formal proceeding and evidentiary hearing on the proposed Agency Order No.: PSC-05-0251-PAA-TP on the Application by MCG Capital Corporation ("MCG"), IDS Telcom Corp. ("New IDS"), and IDS Telcom LLC ("Old IDS") for a transfer of, and name change on, the competitive local exchange telecommunications company (CLEC) Certificate No. 5228 of Old IDS to New IDS, and a waiver of Rule 25-4.118, Florida Administrative Code, due to the proposed transaction to transfer the assets and customers of Old IDS to New IDS.

Name and Address of Affected Agency and Identification Number:

CMP _____
 COM _____
 CTR _____
 ECR _____
 GCL _____
 OPC _____
 MMS _____
 RCA _____
 SCR _____
 SEC _____
 OTH _____

- The name and address of the agency affected by this Petition is the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.
- The Docket Number before the Florida Public Service Commission on the Application of MCG, New IDS, and Old IDS is 050111-TP.

Kim P.
Done 03/11/05
Kim P.
OK
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DOCUMENT NUMBER-DATE
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3. The Order Number of the Florida Public Service Commission approving transfer of and name change on CLEC Certificate No. 5228, and granting waiver of Rule 25-4.118, Florida Administrative Code, is PSC-05-0251-PAA-TP issued March 4, 2005.

Name and Address of Petitioner and Petitioner's Representative:

4. The name, address and telephone number of the Petitioner is Phyllis Heiffer, 3301 N.E. 5th Avenue, Apt. 1117, Miami, FL 33137, (305) 576-2199.

5. The name, address and telephone number of Petitioner's Representative is John M. Cooney, Esquire, Broad and Cassel, One Financial Plaza, Suite 2700, Fort Lauderdale, Florida 33394 (954) 764-7060.

Statement of Substantial Interest Affected:

6. Petitioner's substantial interests will be affected by the agency's determination in granting a transfer of CLEC Certificate No. 5228 from Old IDS to New IDS in the following manner:

- a. Petitioner is a former National Account Manager of Old IDS. After first hiring the Petitioner and obtaining her extensive book of business, Old IDS terminated Petitioner on December 28, 2001. On January 10, 2002, Old IDS (through its counsel) sent Petitioner a threatening cease and desist letter [attached hereto as Exhibit 1], and began to aggressively pursue the Petitioner in an attempt to shut Petitioner out of the telecommunications sales business entirely, and capture her book of business, through enforcement of a so-called "non-competition/nonsolicitation" provision of her employment agreement. Old IDS's conduct was contrived, pre-meditated and with malicious intent, as the management of Old IDS *knew* that Old IDS had no non-compete agreement

whatsoever in Petitioner's Employment Agreement. Old IDS also knew that it did not have an enforceable non-solicitation agreement unless and until there was a transfer of assets from Old IDS to a new entity and Petitioner was paid her deferred compensation bonus. After vigorous litigation, including two appeals initiated by Old IDS, and a jury trial, the Judge in the case determined that the so-called "non-competition/nonsolicitation" provision that Old IDS sought to enforce was not a non-compete at all, and the non-solicitation provision was entirely unenforceable as a matter of law. As a result of that litigation, Petitioner obtained a permanent injunction which was issued by a Florida court of competent jurisdiction and **which permanently restricts Old IDS from engaging in certain enumerated competitive business practices affecting certain telecommunications customers.** [See Exhibit 2, attached hereto, at par. 3.]

- b. Petitioner is a "creditor" of Old IDS, as defined in Florida's Uniform Fraudulent Transfer Act, Florida Statute § 726.101, et seq., and other provisions of Florida law. Petitioner has been adjudicated the prevailing party in the action by Old IDS to seek enforcement of the so-called non-competition/nonsolicitation provision which resulted in Petitioner obtaining her permanent injunction against Old IDS. Petitioner has an unliquidated, disputed claim against Old IDS for the legal fees that she was forced to expend in defeating the claims brought against her by Old IDS. These legal fees total over \$450,000.00. The amount of these legal fees which Petitioner is entitled to recover from Old IDS will be determined at a judicial proceeding to be held in April or May 2005.

- c. Additionally, upon the transfer of assets from Old IDS to New IDS, and within fifteen (15) days there from, Old IDS or its successor is contractually obligated to pay the Petitioner, as deferred compensation and in recognition of Petitioner's past and valuable services to Old IDS, an amount valued at \$253,395.33. Old IDS has acknowledged in open court its duty to pay the Petitioner *when and if a transfer of its Assets to a new entity ever occurs*, but has made no provision for such payment to the Petitioner despite the current application for a transfer of Assets from Old IDS to New IDS.
- d. Old IDS and New IDS have entered into an Asset Purchase Agreement whereby New IDS has agreed to purchase all of the Assets of Old IDS. As a result of the proposed transaction, Old IDS's Assets, including all of Old IDS's operations and customers, will be transferred and Old IDS's Florida certifications will be assigned to New IDS, a newly created, wholly-owned direct subsidiary of Cleartel Communications, Inc., which is indirectly owned by MCG. Neither MCG (the ultimate Buyer), New IDS, nor Old IDS have provided sufficient assurances that Creditors, like Petitioner, will be paid following the asset transfer, or that Old IDS will not be left insolvent to satisfy these claims. This raises an issue as to whether or not Old IDS is seeking to transfer its business to New IDS in order to hinder, delay or defraud Petitioner in satisfying her claims, and in violation of Florida Statute §726.104.
- e. Neither MCG, New IDS, nor Old IDS have provided any assurances that the enjoined behavior of Old IDS won't be repeated by New IDS. As stated in the Joint Petition, New IDS will continue to have access to the management team of

Old IDS, whose bad conduct resulted in the permanent injunction against Old IDS, and the transfer of business from Old IDS to New IDS could be used to avoid the business practice restrictions that have been permanently imposed on Old IDS by a Florida court.

- f. Pursuant to Rule 364.345 (2), Florida Statutes, a telecommunications company may not sell, assign, or transfer its certificate or any portion thereof without: (a) a determination by the commission that the proposed sale, assignment, or transfer is in the public interest; and (b) the approval of the Commission. Further, pursuant to Rule 25-4.118, Florida Administrative Code (“F.A.C.”), a customer’s telecommunications provider cannot be changed without the customer’s authorization. However, pursuant to Section 364.337 (4), Florida Statutes, and Rule 25-24.455 (4), F.A.C., a waiver can be granted if the Commission finds that it is in the public interest. In addition to whether it is in the public interest, the Commission can consider “[t]he extent to which competitive forces may serve the same function as, or obviate the necessity for, the provision sought to be waived; and [a]lternative regulatory requirements for the company which may serve the purposes of this part.”
- g. Despite the fact that the agency’s approval is, at this time, merely contingent, preliminary, and not final, the customers of Old IDS have already been mailed the letter-notification announcing that New IDS will become their service provider effective March 31, 2005. Old IDS and New IDS have already mailed out the draft form of notice addressed to “Valued IDS Customers”, attached hereto as Exhibit 3, which should have awaited final agency action.

h. Petitioner's interest as a member of the public will be adversely affected by the granting of this Joint Petition for name change and transfer for the following reason:

i. The managerial capacity and quality of New IDS is suspect due to the integration of the management team of Old IDS who have demonstrated a disregard of their financial and contractual obligations to former employees and creditors, and whose past conduct has resulted in a permanent injunction against Old IDS.

When and How Petitioner Received Notice of the Agency Decision:

7. Petitioner received notice of the Florida Public Service Commission's decision approving the transfer of, and name change on, CLEC Certificate No. 5228 on or about March 4, 2005, when she obtained a copy of the Notice of Proposed Agency Action over the internet.

8. Petitioner was actually aware that the Petition was pending and that a proposed Order was forthcoming several weeks prior to the entry of the proposed Order.

Statement of Disputed Issues of Material Fact.

9. Petitioner disputes the material asserted fact that approval of the transfer and the granting of the waiver is in the public interest. MCG, New IDS, and Old IDS have failed to make provisions for payment to creditors of Old IDS upon the transfer of the assets from Old IDS to New IDS, especially where such transfer of assets specifically *triggers* payments to former and current employees of Old IDS, and where no assurances have been made that Old IDS will have sufficient assets to satisfy the claims of creditors of Old IDS.

10. Petitioner disputes the material asserted fact that New IDS has the managerial capacity to conduct the business of Old IDS in a manner that will serve the public interest. As

stated in the Joint Petition, New IDS will continue to have access to the management team of Old IDS, whose conduct resulted in the permanent injunction prohibiting certain competitive business practices against Old IDS, and the transfer of certificates from Old IDS to New IDS could be used to avoid the business practice restrictions that have been permanently imposed on Old IDS by a Florida court.

11. Petitioner disputes the material asserted fact that the proposed transfer of assets from Old IDS to New IDS serves the public interest where that transfer of assets may have been made with the intent to hinder, delay or defraud creditors, like the Petitioner, in satisfying their claims, in violation of Florida Statutes §726.104, and/or to avoid the business practice restrictions permanently imposed on Old IDS.

12. Petitioner anticipates that MCG, New IDS, and Old IDS will dispute that the granting of the Joint Petition for name change and transfer will not be in the public interest.

Statement of Ultimate Facts Alleged Which Warrant Reversal of Agency Action.

13. Petitioner claims that the transfer and name change of Certificate No. 5228 to New IDS is not in the public interest and therefore must be reversed. Specifically, the transfer is not in the public interest because: it makes no provision for the payment of Old IDS' creditors upon transfer; it makes no provision for the payment of deferred compensation bonuses to former and current employees of Old IDS that is specifically triggered by the transfer of assets from Old IDS to New IDS; it unfairly and unlawfully avoids the permanent injunction issued against Old IDS by a Florida court; and it may be an unlawful transfer of assets from Old IDS to New IDS in violation of Florida's Uniform Fraudulent Transfer Act.

Statement of Specific Rules and Statutes Which Requires Reversal or Modification of the Agency's Proposed Action.

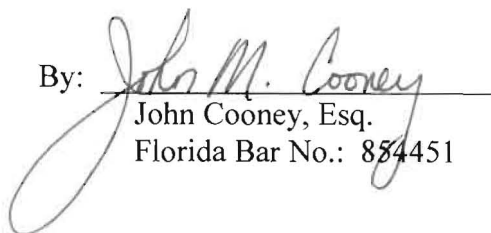
14. The Agency's proposed action violates §364.345 (2), Florida Statutes (can't transfer unless in the public interest); Rule 25-4.118, F.A.C. (provider can't be changed without the customer's authorization); and §364.337 (4), Florida Statutes, and Rule 25-24.455 (4), F.A.C. (waiver only if in the public interest).

Statement of Relief Sought.

15. Petitioner seeks the following relief:
- a. This Agency grant a proceeding pursuant to Florida Statutes §§ 120.569 and 120.57, and Rule 28-106.201, Florida Administrative Code, and hold an evidentiary hearing on MCG, New IDS, and Old IDS's Joint Petition and Petitioner's Objections;
 - b. The Order approving transfer of and name change on CLEC Certificate No. 5228 and granting waiver of Rule 25-4.118, Florida Administrative Code, be rescinded;
 - c. MCG, New IDS and Old IDS's Joint Petition be denied; and
 - d. That Petitioner be granted all relief to which she is entitled.

Respectfully submitted,

BROAD AND CASSEL
Counsel for Petitioner, Phyllis Heiffer
Post Office Box 14010
Fort Lauderdale, FL 33302
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By: 
John Cooney, Esq.
Florida Bar No.: 854451

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JOAN M. CANNY
DIRECT LINE (305) 789-3463
email:jcanny@swmwas.com

January 10, 2002

*Via Facsimile Transmission (305-576-0545)
and Overnight Delivery*

Phyllis Heiffer
3301 N.E. 5th Ave., Apt. 1117
Miami, FL 33137

Re: Tortious Interference with Business Relations and Violation
of your Restrictive Covenants pursuant to IDS Employment Agreement

Dear Ms. Heiffer:

It has come to the attention of IDS that you have been violating the terms of your IDS Employment Agreement and further have been engaging in conduct which constitutes tortious interference with business relations. More specifically, we have information that you have been communicating with customers of IDS and advising them against doing business with IDS. Such conduct plainly violates your valid and binding obligation in Section 9 of your Employment Agreement to use your best efforts to ensure that customers of IDS remain with IDS for the 12-month non-compete period following your termination. In addition, your conduct is intentional, tortious, and wrongful interference with IDS's business relationships without legal justification. Because your conduct appears to be wanton, willful, and malicious, we have a reasonable expectation of obtaining punitive damages against you.

If we do not receive from you by close of business Monday, January 14, 2002, (1) a written assurance that you are not and will not be communicating in any manner with any IDS customers or prospective customers, and (2) a list of customers or prospective customers, including the contact person at those customers or prospective customers, that you have had contact or communication with since December 27, 2001, specifying the nature of your contact or communication, we will bring an action for injunction and damages against you to protect the lawful interests of IDS. In such case you may be enjoined by the court enforceable through contempt of court, and may also be liable for damages, punitive damages, court costs and attorney's fees.

Very truly yours,



Joan M. Canny

Enclosure
cc: Robert H. Hacker

IN THE CIRCUIT COURT OF THE 17th
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

PHYLLIS HEIFFER,

Plaintiff,

CASE NO: 02-00749 CACE 14

v.

IDS LONG DISTANCE, INC., a Florida corporation,
IDS TELCOM, a Florida General Partnership, IDS
TELCOM LLC, a Florida limited liability company,
and JOHN DOE, individually,

Defendants.

IDS LONG DISTANCE, INC., a Florida corporation,
IDS TELCOM LLC, a Florida limited liability
company,

Plaintiffs,

v.

PHYLLIS HEIFFER, TELECOMSMART.COM.,
INC., a Florida corporation, and TERESA
GROSSO, an individual,

Defendants.

FINAL JUDGMENT

THIS CAUSE having come on for jury trial before this Court commencing on May 24, 2004, and concluding on May 27, 2004, related to those matters raised in this Cause as between and among Plaintiff, PHYLLIS HEIFFER (“Heiffer”), whose address is 3301 N.E. 5th Avenue, Apt. 1117, Miami, FL 33137; and Defendants, IDS LONG DISTANCE, INC., a Florida corporation, IDS TELCOM, a Florida General Partnership, and IDS TELCOM LLC, a Florida limited liability company (collectively, the “IDS parties”), whose address is 1525 N.W. 167th Street, Suite 200, Miami, Florida 33169; and pursuant to directed verdicts rendered by the Court at the close of all of the evidence in the case, and also pursuant to voluntary dismissals of certain claims by the parties, this Court orders, adjudges and finds as follows:

1. Based upon the evidence that was presented at trial, the Court finds that the Non-Solicitation provision of Section 9 of the Employment Agreement (Plaintiff's Exhibit 1) is unenforceable as a matter of law. Therefore, on the claim by the IDS parties to enforce the Non-Solicitation provision (Count I of IDS' Second Amended Complaint), the Court directs a verdict in favor of Phyllis Heiffer and against the IDS parties. Judgment is hereby entered in favor of Phyllis Heiffer and against the IDS parties on Count I of the IDS parties' Second Amended Complaint who shall take nothing on their claim.

2. Based upon the evidence that was presented at trial, the Court finds that a "change of control" as defined in the Employment Agreement (Plaintiff's Exhibit 1) did not occur. On the claim by Phyllis Heiffer for deferred compensation (Count I of Heiffer's Second Amended Complaint), the Court directs a verdict in favor of the IDS parties and against Phyllis Heiffer. Judgment is hereby entered in favor of the IDS parties and against Phyllis Heiffer on Count I of Phyllis Heiffer's Second Amended Complaint who shall take nothing on this claim.

3. Based upon the Court's ruling in Paragraph 1, above, and based on the evidence presented at trial, the Court finds that with respect to Count V of Phyllis Heiffer's Second Amended Complaint for injunctive relief, Phyllis Heiffer is entitled to permanent injunctive relief. Accordingly, the IDS parties are hereby enjoined from oral or written communication which conveys any impression that Phyllis Heiffer is restricted in her employment by any enforceable restrictive covenants with the IDS parties; from disconnecting the local and long distance service of any customers who elect to follow Phyllis Heiffer from IDS Telcom LLC to another carrier, and from changing the long distance carrier codes and freezing accounts of any customers who have elected to follow Phyllis Heiffer from IDS Telcom LLC to another carrier; and from otherwise interfering in any way with Phyllis Heiffer's business relationships, her

ability to solicit any customers for telecommunications services, and her future employment opportunities. This injunction shall not preclude IDS from competing in the industry with Phyllis Heiffer.

4. On Count VI of Heiffer's Second Amended Complaint alleging intentional infliction of emotional distress against the IDS parties, the Court notes that Phyllis Heiffer voluntarily dismissed this claim, without prejudice, on or about January 22, 2004, during the discovery phase of this case.

5. On Count IV of IDS' Second Amended Complaint alleging misappropriation of trade secrets against Phyllis Heiffer, the Court notes that the IDS parties voluntarily dismissed this claim, without prejudice, on or about May 19, 2004, after the discovery cut-off in this case (but prior to trial).

6. On Counts II and IV of Heiffer's Second Amended Complaint for unpaid commissions against the IDS parties, the Court notes that Phyllis Heiffer voluntarily dismissed these claims, without prejudice, on or about May 20, 2004. The claim by Phyllis Heiffer for deferred compensation is not encompassed in the dismissal of Counts II and IV.

7. On Count III of Heiffer's Second Amended Complaint for breach of Florida's Whistleblower's Act against IDS Telcom LLC, the Court acknowledges that Phyllis Heiffer voluntarily dismissed this claim, without prejudice, on or about May 24, 2004 on the first day of trial.

8. On Count III of IDS' Second Amended Complaint for breach of tortious interference against Phyllis Heiffer, the Court acknowledges that the IDS parties voluntarily dismissed this claim, without prejudice, on or about May 27, 2004 on the last day of trial.

9. On Counts V and VI of IDS' Second Amended Complaint for conversion and civil theft against Phyllis Heiffer, the Court acknowledges that the IDS parties voluntarily dismissed these claims, without prejudice, on or about May 27, 2004 on the last day of trial.

10. All claims that were voluntarily withdrawn by the parties hereto are deemed dismissed with prejudice.

11. The Court further reserves and retains jurisdiction to determine entitlement and amount of attorneys' fees and legally taxable costs, and to consider any post-trial motions.

DONE, ORDERED AND ADJUDGED in Chambers at Fort Lauderdale, Florida,

JUL 14 2004
TRIP COPY

CIRCUIT COURT JUDGE

Copies furnished to:

Franklin L. Zemel, Esquire – Broad and Cassel
Mitchell L. Feldman, Esquire – Silver, Levy & Feldman



Dear Valued IDS Customers,

We are pleased to announce an asset purchase agreement between IDS Telecom, LLC and IDS Telecom Corp., a ClearTel Communications company. This agreement will become effective and IDS Telecom Corp. will become your service provider on or about March 31, 2005.

During the past twelve months we've worked hard to create new product offerings and streamline provisioning and customer service processes. The end result is a stronger communications company to serve you better.

There are several assurances we want to make to you, our highly valued customer. First, especially in today's marketplace, IDS Telecom Corp., a ClearTel Communications company is committed to meeting the highest possible customer service standards.

Second, we can assure you that the hundreds of fine employees at IDS Telecom Corp. are committed to providing our customers with the best in telecommunications quality and services. Additionally and perhaps most importantly, ClearTel has the experience and resources to ensure that IDS Telecom Corp. meets your telecommunications needs. ClearTel Communications is a national Competitive Local Exchange Carrier, operating in over twenty nine states. Our mission is providing exceptional value through superior customer support and advanced services.

It's also important for you to know:

- * The services you have paid for will not be impacted as a result of this agreement.
- * Your existing rates and charges will not be changed as a result of this transaction.
- * You will still pay for/renew your services in the same way you do today.

We recognize that you have the right to choose your telephone service provider. If you do choose another provider you may incur installation or carrier change charges. If you stay with Old IDS, however, you will not incur any such charges for the transfer to IDS Telecom Corp. Further, you will not need to take any action for the transfer to IDS Telecom Corp. to occur (Additionally we will maintain any preferred carrier freeze you may have)

If you have any questions about this notice or problems with your current service, please call IDS at 1-888-707-6600. To ensure a seamless transition of service, please note that IDS Telecom Corp. intends to keep that same number after the transition.

We appreciate your business and your commitment to IDS during this transitional time. The future looks bright as we move forward with new bundled local/long distance products, Internet services including web hosting and broadband internet solutions to residential and business customers.

Sincerely,

IDS Telecom Corp.

IDS Telecom, LLC