State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: July 8, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Barrett)
Office of the General Counsel (Christensen)

RE: Docket No. 040488-TP – Complaint of BellSouth Telecommunications, Inc. against IDS Telcom LLC to enforce interconnection agreement deposit requirements.

AGENDA: 07/20/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: July 21, 2004

SPECIAL INSTRUCTIONS: Service to IDS may be terminated by BellSouth if the Commission does not render a decision by July 21, 2004.

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040488.RCM.DOC

Case Background

On May 21, 2004, BellSouth Telecommunications, Inc. (BellSouth, or Petitioner) filed a complaint against IDS Telecom LLC (IDS) to enforce certain deposit requirements in their Interconnection Agreement[1] (hereafter, the Deposit Complaint). The specific requirement at issue states that service may be terminated if the dispute before the Commission is not resolved in 60 days. (See BellSouth's Exhibit A, attached to the Deposit Complaint) Day 60 is July 21, 2004. Although separate, this docket is closely aligned with Docket No. 031125-TP, a pending billing dispute involving these two parties. Docket No. 031125-TP (hereafter, the Billing Complaint docket) is currently set for a September 10, 2004 hearing.

[1] The current interconnection agreement between BellSouth and IDS became effective by operation of law on May 11, 2003. (See Docket No. 030158-TP)

On June 11, 2004, IDS filed its Answer and Affirmative Defenses and Counterclaim to BellSouth's Complaint (Answer). On June 21, 2004, BellSouth filed an Answer to the IDS Counterclaim (Counterclaim Answer).

Due to the expedited nature of this proceeding, staff and the parties agreed to provide informational briefs to assist in formulating this recommendation. Due to the time constraints of this matter, the filing schedule will enable a Commission decision within 60 days of BellSouth's petition.

On June 28, 2004, BellSouth filed its Briefs in this matter, and on June 29, 2004, IDS filed its Brief.

This recommendation addresses BellSouth's Deposit Complaint and the IDS Answer and certain Affirmative Defenses in Issue 1; Issue 2 addresses the IDS Counterclaim.

Jurisdiction

The Commission has jurisdiction under Section 252 of the Act to resolve disputes involving interconnection agreements approved by this Commission. Part II of the federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carriers, and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

State Commissions retain primary authority to enforce the substantive terms of agreements they have approved pursuant to Sections 251 and 252 of the Act. Iowa Utilities Board v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997). A petition has been filed requesting our review of an agreement we previously approved to determine if the parties are in compliance with that agreement. As set forth in BellSouth Telecommunications, Inc., et al. v. MCIMetro Access Transmission Services, Inc., et al., 317 F.3d 1270 (11th Cir. January 2003), ". . . the language of §252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts."

Moreover, this Commission has authority under state law to review complaints regarding interconnection agreements approved by this Commission. Section 364.01, Florida Statutes, provides that this Commission has authority over telecommunications companies. Section 364.162, Florida Statutes, states, in pertinent part, that:

> The [C]ommission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

This statutory language plainly authorizes this Commission to resolve complaints regarding the interpretation of interconnection agreements, which is the case herein.

Thus, based on BellSouth v. MCIMetro and Section 252 (c)(1), this Commission has the authority to review a complaint based on an interconnection agreement approved by this Commission. Further, pursuant to Sections 364.01 and 364.162, Florida Statutes, this Commission has state authority to review a complaint regarding an interconnection agreement approved by this Commission.

Discussion of Issues

Issue 1: Pursuant to the terms of the Interconnection Agreement, can BellSouth collect a security deposit from IDS? If so, what is the appropriate amount?

Recommendation: Yes. Under the terms of the Interconnection Agreement, BellSouth is entitled to collect a security deposit from IDS; however, the amount BellSouth is requesting is inappropriate. Therefore, as an interim measure, subject to true-up, IDS should place $2 million in an escrow account within 7 calendar days of the Commission's vote on this item until a final deposit amount can be determined by this Commission, or negotiated by the parties. IDS should provide the Commission with proof that the escrow account has been established within the designated time frame. If IDS does not establish an escrow account as per this Commission's vote, then BellSouth should be allowed to enforce the deposit provisions of the Interconnection Agreement.

Staff Analysis: Staff notes that the scope of its analysis will be limited to the deposit requirement issue as filed in this docket, although references to the Billing Complaint Docket are contained in the respective arguments from the parties. In addition, on June 25, 2004, IDS filed a Request for Approval of Amendment to the existing IDS-BellSouth interconnection agreement (see Docket No. 040611-TP). IDS represents that the parties agreed to replace the current deposit provisions/requirements with deposit provisions from an agreement BellSouth has with another carrier.[2] In its Brief, BellSouth asserts that no such accord was reached. Although each party's Brief contains argument regarding this adoption, Docket No. 040611-TP will address this matter.

BellSouth's Argument

Referencing Attachment 7, Section 1.8 of its current Interconnection Agreement, BellSouth asserts that it has the right to request and secure a deposit from IDS. (Deposit Complaint at ¶5) Importantly, the current Interconnection Agreement provides that if the [Commission] dispute is not resolved in 60 days, and IDS fails to remit to BellSouth any

[2] By operation of law, an amendment is effective 90 days from the date filed; in this instance, September 23, 2004.

deposit requested pursuant to the applicable section, BellSouth is permitted to terminate service to IDS in accordance with Attachment 7, Section 1.7. (Deposit Complaint at ¶7)

In its Brief, BellSouth asserts that its case is rooted in five established facts:

1. The current agreement contains deposit provisions that are unambiguous and obligate IDS to post a deposit

   BellSouth states that when purchasing services, an initial analysis regarding creditworthiness is undertaken based on information supplied from IDS - information which BellSouth uses to develop a value to represent some form of security for BellSouth. Of note, BellSouth stresses that it reserves the right to request additional security, "If, in the sole opinion of BellSouth, IDS experiences an adverse change in its creditworthiness in comparison to the level initially used . . ." (emphasis added, Deposit Complaint at ¶5; BellSouth Brief at 2) BellSouth believes Attachment 7, Section 1.8 requires three things:

   a. That BellSouth provide to IDS a written explanation why a deposit is being requested;

   b. That the deposit amount not exceed two months' estimated billing, and be developed by BellSouth using credit standards applied[3] on a non-discriminatory basis; and

   c. That IDS and BellSouth are obligated to work together to determine the amount of a reasonable deposit. If the parties are unable to agree, either party may petition the Commission for resolution of the dispute.

   (Deposit Complaint at ¶6; BellSouth Brief at 2-3)

2. BellSouth applies its deposit policies in a non-discriminatory manner based on objective financial data

   BellSouth states that although its deposit policies are not at issue, it conducts periodic credit reviews of all of its wholesale customers to indicate a severity of risk. BellSouth asserts that such reviews are conducted in a non-discriminatory manner, and evaluate no less than 12 factors, including information from Dun & Bradstreet and Moody's.[4] For IDS, this process began in May 2003, one year prior to the inception of this proceeding.[5] (BellSouth Brief at 3-5)

[3] "Credit standards" and related topics were discussed in the proprietary correspondences, which are attached as Exhibits C-G to the Deposit Complaint, and also in Exhibits to BellSouth's Brief.
[4] Dun & Bradstreet (D&B) & Moody's are widely recognized companies that specialize in objectively evaluating the financial strength of companies. BellSouth uses the D&B Credit Rating and D&B PAYDEX measures in its credit evaluation; BellSouth uses the Moody's RiskCalc score for the same purpose. (BellSouth Brief at 4)
[5] A May 7, 2003 letter from BellSouth to IDS established the timeline for BellSouth's deposit request. Each party attached as exhibits to its respective pleadings numerous correspondences (letters and copies of e-mails) from that date forward, many of which are proprietary.

3. IDS violated the agreement by failing to provide information requested by BellSouth to perform its credit review

When conducting credit reviews, BellSouth requests information directly from companies, and in this matter, BellSouth repeatedly requested audited financial statements from IDS – items which were never provided.[6] BellSouth believes the inaction from IDS was " . . . meant to frustrate and delay BellSouth's rights under the Interconnection Agreement." (BellSouth Brief at 6-7)

4. BellSouth completed its credit review and formally requested a deposit from IDS

Based on the results of its credit review, BellSouth formally requested a deposit from IDS in the amount of $4.6 million on December 9, 2003. The deposit amount was calculated as follows:

a. BellSouth developed an average monthly billing for services rendered to IDS; the average was based on the most recent six-month period. The resultant calculation was approximately $2.3 million; and

b. BellSouth multiplied the average monthly billing amount by a factor of 2 to yield $4.6 million.

(BellSouth Brief at 7, 13) In accordance with the interconnection agreement, BellSouth provided detailed explanations to IDS to document its deposit request. Via numerous written correspondences (most of which are proprietary),[7] BellSouth cited to the objective scores, measures, and financial ratios it used in its evaluation, and reached an overall conclusion that " . . . there can be no question that IDS constitutes a substantial credit risk." (BellSouth Brief at 9)

5. IDS violated the agreement by refusing to negotiate the deposit amount in good faith

Even though this process began months earlier, BellSouth formally requested the $4.6 million deposit in a December 9, 2003 letter. A number of communications followed that letter.[8] BellSouth claims IDS never engaged in negotiations regarding this specific request, instead challenging BellSouth's right to even request a deposit. (BellSouth Brief at 9-10, 13) As a result, BellSouth claims that "IDS has done everything in its power to prevent BellSouth from enforcing its contractual rights and has refused to honor its obligations under the Interconnection Agreement." (BellSouth Brief at 13)

[6] Numerous public and proprietary correspondences (letters and copies of e-mails) support this allegation. BellSouth asserts it sought to obtain these on at least 9 occasions in a six-month period before moving forward with its enforcement efforts. (BellSouth Brief at 7)
[7] The correspondences included the actual score values (i.e., D&B data, Moody's, etc.), and included supporting analysis as well.
[8] Each party submitted public and proprietary documents that generally refer back to the December 9, 2003 letter.

Throughout its Brief, BellSouth reaffirms arguments previously made and asserts that this matter " . . . involves a simple contract analysis." (BellSouth Brief at 1) BellSouth contends that IDS has failed to substantively respond to negotiate the deposit amount and alternative means of security, and this inaction left BellSouth no alternative but to file the instant Complaint. (Deposit Complaint at ¶¶9-11)

IDS' Argument

IDS contends that BellSouth's deposit request is not warranted as a threshold matter because BellSouth failed to perform any analysis that demonstrates that IDS experienced "an adverse change in its creditworthiness," when in fact IDS' creditworthiness has only improved since completing BellSouth's Credit Profile. (IDS Brief at 2) IDS demands strict proof that BellSouth has engaged in the actions alleged in the Deposit Complaint. Specifically, IDS demands proof that BellSouth conducted a legitimate credit analysis of IDS as the basis for requesting the $4.6 million deposit amount. In addition, IDS demands proof that BellSouth attempted in good faith to negotiate the deposit issue. (Answer at ¶¶5-18)

In its Brief, IDS provides more argument for the Affirmative Defenses it advanced in its Answer. The Affirmative Defenses are as follows:

1. BellSouth has breached the covenant of good faith and fair dealing in this matter

   IDS believes BellSouth breached the covenant of good faith because it:

   a. Failed to consider any other deposit other than the maximum allowable, an approximation of 2-months' billing;

   b. Did not apply its credit standards on a non-discriminatory basis; and

   c. Never worked in good faith to negotiate a deposit amount.

   (IDS Brief at 2)

   Additionally, IDS claims that billing errors and timeliness of bills are factors which should be considered. IDS claims that it is unfair that BellSouth's credit analysis tools, which evaluated the relative timeliness of payments, reflected a slow payment history – a point IDS disputes because IDS claims that it does not consistently receive bills in a timely manner. (IDS Brief at 10)[9] Also, IDS claims that these same indices are inaccurate since the bills it receives are inaccurate, and the dispute resolution process impacts the timeliness of rendering payments. (IDS Brief at 11)[10]

[9] Certain of the proprietary exhibits contain the numeric data regarding the timeliness of payments.
[10] IDS argues generically that all BellSouth bills rendered to CLECs are inaccurate. (IDS Brief at 21)

2. BellSouth itself has failed to comply with the terms which it seeks to enforce[11]

IDS acknowledges that Section 27 of the General Terms and Conditions in its current agreement obligates the parties to adhere to "Good Faith Performance." (IDS Brief at 6) Throughout its Brief, IDS alleges that BellSouth is not doing so. For example, IDS claims its own research provides evidence that BellSouth has extended various other deposit terms to other CLECs - terms which it has not offered IDS. (IDS Brief at 3, 5, 22) IDS argues that it has secured the financial backing of a publicly traded company with assets that exceed liabilities by over $455 million. This investor has indicated a willingness to provide an "alternative form of security" on commercially reasonable terms. (IDS Brief at 23) According to IDS, it believes that, if this investor changes its position on the corporate guarantee, IDS should be allowed to post a security agreement[12] in lieu of a deposit, an arrangement BellSouth has with another CLEC. (IDS Brief at 23) IDS believes that as a measure of good faith, such an arrangement should be offered to them. In addition, IDS believes it should be given the opportunity to build up a requested deposit over time, in contrast to paying it as a lump sum. (IDS Brief at 23) Finally, IDS acknowledges that BellSouth has provided it with written correspondence regarding the deposit request, but claims the documents in its possession have not been adequate to engage in deposit negotiations. IDS states the written explanation provided by BellSouth should be sufficient enough for IDS to negotiate fair and non-discriminatory treatment. (IDS Brief at 9)

3. This Commission lacks the jurisdiction to enforce the deposit request that BellSouth seeks to impose[13]

According to IDS, BellSouth's deposit request improperly seeks to establish deposit requirements for services rendered in other states. (IDS Brief at 4) IDS believes the Florida Commission lacks jurisdiction to do so, and cites to a Georgia case wherein a deposit request by BellSouth to another carrier was representative of multiple states. (IDS Brief at 18, Exhibits 19-20, attached to the IDS Brief)[14] IDS believes the most reasonable solution to this matter is to determine a deposit amount on a state-by-state basis. IDS believes the requested amount ($4.6 million) is grossly inflated and overstated, and counters that a more appropriate amount would be "approximately $2 Million." (IDS Brief at 4) IDS asserts that the $2 million figure accounts for billing errors and disputes, and is based on its own calculation of the average gross billings for January through May, 2004.[15] (IDS Brief at 20) According to IDS, if the billing errors and disputes are not accounted for in this calculation, the maximum 2-month security deposit would be about $2.7 million. (IDS Brief at 20)

[11] The 2nd and 9th Affirmative Defenses from IDS offer similarly structured arguments.
[12] Such an arrangement is alternatively identified as a UCC-1 (IDS Brief at 22).
[13] The 3rd and 4th Affirmative Defenses from IDS offer similarly structured arguments. IDS believes the deposit amount BellSouth seeks to impose may have been developed based on billing data that is not Florida-specific. Any requested deposit amount should be based upon billing data that is Florida-specific.
[14] IDS believes the outcome of this matter resulted in a concession by BellSouth that "it was only proper to seek a deposit for services rendered in the relevant state in which services are provided." (IDS Brief at 19)
[15] Proprietary Exhibit 21 of the IDS Brief contains the billing data IDS used for its calculations; based upon its calculations, the 1-month average figure was $1,020,575.66. (IDS Brief at 20)

4. BellSouth has refused to allow IDS to amend or adopt provisions contained in other interconnection agreements in Florida

   The 5th and 8th Affirmative Defenses from IDS offer similar arguments. This subject matter is discussed in the IDS Counterclaim, and in the Briefs from each Party. This topic is addressed in Issue 2.

5. BellSouth has applied its deposit request to IDS in a discriminatory and improper manner

   IDS asserts that BellSouth concedes that its D & B scores were "remarkably good," yet BellSouth states it relied on other factors to determine that a deposit is necessary. (IDS Brief at 20) IDS cites to a case involving BellSouth and another carrier wherein BellSouth appears to treat the D & B data in a different manner than it has with IDS. (IDS Brief at 21-22) IDS believes this clearly demonstrates that BellSouth has not applied its credit standards in a non-discriminatory manner. (IDS Brief at 22)

6. BellSouth has violated applicable state and federal rules, regulations, rulings, and law, and thus, is barred from seeking the requested relief

   In its Brief, IDS argues that the instant case should be interpreted in accord with the "new" language IDS wishes to adopt (see Docket No. 040611-TP). IDS states that "this adoption eliminates Section 1.8 of Attachment 7 of the [current] Interconnection Agreement, thereby eliminating BellSouth's alleged right to take unilateral action if this docket is not resolved within 60 days." (IDS Brief at 18) Alternatively, IDS states that if the Commission determines that Section 1.8 of Attachment 7 is still applicable, IDS believes BellSouth's deposit request should be denied because:

   a. BellSouth has failed to demonstrate additional security is necessary;

   b. BellSouth has breached the good faith provisions of the current agreement by refusing IDS' adoption requests;

   c. BellSouth has breached the deposit provisions of the current agreement by applying its credit standards in a discriminatory manner; and

   d. BellSouth has breached the deposit provisions of the current agreement by failing to offer alternative forms of security to IDS, and for failing to work in good faith with IDS toward a resolution of this issue.

   (IDS Brief at 24)

In summary, IDS believes that if the Commission finds that a deposit is required, IDS should be allowed to explore deposit alternatives and terms, including a third party corporate guarantee arrangement, or a plan to pay the deposit in installments. (IDS Brief at 25) In the event a deposit is required, IDS believes the supporting calculations used in deriving such amount should be limited to Florida-only services, and should account for billing errors and disputes; by IDS' calculation, this would yield a 2-month maximum value of $2 million, or $2.7

million if billing errors and disputes are not factored into the calculation. (IDS Brief at 24-25) However, IDS believes a more reasonable deposit amount would be to use a 1-month threshold, yielding a figure of $1 million, on the basis that it:

1. regularly pays the non-disputed portion of its bill within the general time of 30 days from receipt;

2. has an excellent D & B credit rating;

3. is subject to the termination of services by BellSouth in 30 days if IDS fails to pay undisputed amounts; and

4. believes BellSouth owes IDS monthly amounts for accessing its facilities.

(IDS Brief at 25)

Analysis

BellSouth has determined it is necessary to request a deposit in the amount of $4.6 million from IDS. As such, staff believes this decision initiated a 3-step process: [16]

- A formal deposit request was issued (See Exhibit B to BellSouth's Deposit Complaint, the December 9, 2003 letter to IDS from BellSouth);

- A period of time elapsed whereby the parties were to evaluate whether the original request was reasonable;

- The Commission was asked to resolve this dispute.

In relevant part, staff believes BellSouth's argument hinges upon the following language:

> If, in the sole opinion of BellSouth, IDS experiences an adverse change in its creditworthiness in comparison to the level initially used to determine the level of the current security deposit and/or gross monthly billing has increased beyond the level initially used to determine the level of security, BellSouth reserves the right to request additional security . . . (excerpted from Attachment 7, Section 1.8; BellSouth Brief at 2-3)

Staff believes this language is clear and unambiguous; BellSouth is entitled to request a deposit from IDS. However, staff also believes that the amount BellSouth seeks is inappropriate, for two reasons:

1. First, the requested amount was based upon a mathematical calculation[17] that makes no apparent allowance for any adjustments (i.e., billing disputes).

[16] Staff believes the results from BellSouth's credit analysis determine whether it is necessary to request or supplement a deposit; if it is *not* necessary, none of the steps are applicable.

2. Second, the requested amount appears to be based upon the total billings between the companies, in contrast to state-specific billings.

With respect to the first point, the parties to this docket have billing disputes which are pending in Docket No. 031125-TP (the Billing Complaint docket). Staff believes BellSouth inappropriately included disputed amounts in its calculations. BellSouth asserts that its requested amount was based upon two times an average monthly billing for services to IDS; however, BellSouth does not explain whether this calculation considers disputed amounts, nor does BellSouth explain why it would be important to include (or exclude) disputed amounts. In this regard, staff believes the disposition of any pending disputes could affect the average figure. Additionally, staff notes that the Seventh and Ninth Affirmative Defenses offered by IDS also make reference to "disputes."

Regarding the second point, staff believes state-specific values that account for disputes are the appropriate starting point for determining a deposit requirement. In its Brief, BellSouth confirmed that the (confidential) figures it used originally were region-wide figures; BellSouth subsequently determined a Florida-specific figure.[18] The Third and Fourth Affirmative Defenses offered by IDS note that Florida-specific values should be the basis for consideration. Staff emphasizes that the relief sought by BellSouth in this matter references the *Florida* Interconnection Agreement between these two parties. From a jurisdictional perspective, staff believes this Commission should only consider the *Florida-specific* billings and thus, agrees with IDS on this point. Staff believes that the Florida-specific figures are the only values applicable for the purposes of determining the appropriate deposit amount under an interconnection agreement filed and governing the parties' business relationship in Florida.

In order to overcome the concerns that staff noted above, we believe certain adjustments are necessary. Staff believes the original deposit amount of $4.6 million requested by BellSouth should not be considered because it is based on multi-state billing data. Although BellSouth states that the adjusted 2-month figure of $3,470,000.00 would be the Florida-specific deposit requirement, staff believes this value should be rejected as well because this figure makes no allowance for disputes.

In its Brief, IDS performed its own calculations – with and without considering the value of disputes and billing errors. The respective values IDS derived are $2 million (accounting for disputes and errors), and $2.7 million (not accounting for disputes and errors). (IDS Brief at 20, 24-25) Both figures from IDS were calculated on the basis of a 2-month average, although IDS strongly advocates that a 1-month average would be more appropriate. (IDS Brief at 25) Staff disagrees with using a 1-month average figure. Because the D & B ratings are only a portion of what BellSouth considered in its credit evaluation, staff believes BellSouth has evaluated the financial strength of IDS in a more comprehensive manner. Thus,

[17] The "mathematical calculation" and related topics were discussed in the proprietary correspondences, which are attached as "Exhibits C-G" to the Deposit Complaint.
[18] The original amount requested was $4.6 million, a multi-state (regional) figure; BellSouth states that if its calculation was for the Florida-only portion, the resultant amount is $3.47 million. (BellSouth Brief at 14)

staff believes that BellSouth's deposit request based on a 2-month estimate may be more appropriate.[19]

As noted earlier, staff believes that BellSouth is clearly *entitled* to request a deposit. However, because deposit amounts are calculated based on billed amounts, and the parties have significant disputes regarding billed amounts which are pending before this Commission, staff does not believe an accurate deposit amount can be calculated at this time.[20] Moreover, staff believes any attempt to calculate a specific deposit amount at this time could prejudge matters that will come before this Commission in Docket No. 031125-TP. Therefore, staff believes an interim deposit amount should be ordered, and this amount should be subject to true-up.

While there were other figures presented for consideration, staff believes the most appropriate interim deposit amount is $2 million.[21] On balance, this amount appears to provide some level of security for BellSouth during the pendency of this dispute, considers Florida-specific billing data, and possible disputed amounts as well. Therefore, staff recommends that this amount be placed in an escrow account within 7 calendar days of the Commission's vote on this item until a final deposit amount can be determined by this Commission, or negotiated by the parties. IDS should provide the Commission with proof that the escrow account has been established within the designated time frame. If IDS does not establish an escrow account as per this Commission's vote,[22] then BellSouth may enforce the deposit provisions of the Interconnection Agreement. Should this deposit dispute still be an issue at the conclusion of Docket 031125-TP, this matter could be revisited.

Conclusion

Under the terms of the Interconnection Agreement, BellSouth is entitled to collect a security deposit from IDS; however, the amount BellSouth is requesting is inappropriate. Therefore, as an interim measure, subject to true-up, IDS should place $2 million in an escrow account within 7 calendar days of the Commission's vote on this item until a final deposit amount can be determined by this Commission, or negotiated by the parties. IDS should provide the Commission with proof that the escrow account has been established within the designated time frame. If IDS does not establish an escrow account as per this Commission's vote, then BellSouth should be allowed to enforce the deposit provisions of the Interconnection Agreement.

[19] As previously noted, we do not agree with the figure BellSouth derived by using a 2-month estimate, but we agree that a 2-month average is appropriate.
[20] Section 1.8 of Attachment 7 (the Deposit Policy) states that "Security deposits collected under this Section shall not exceed two months' estimated billing."
[21] In its Brief IDS states: " . . . even if IDS was required to post a two month deposit as demanded by BellSouth, the maximum such deposit for services rendered in Florida should not exceed approximately $2 million . . . ." (IDS Brief at p. 4)
[22] The Commission's decision on this recommendation will be issued as a Proposed Agency Action; a Consummating Order will be issued at a later date unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the proposed agency action.

Issue 2: Should the Commission grant the IDS Counterclaim?

Recommendation: No. The Commission should not grant the IDS Counterclaim. Staff does not believe that the language IDS seeks to adopt in Docket No. 040611-TP has retroactive application, and thus, has no direct impact on the current dispute addressed herein. Staff believes the language in-place on the date the Petitioner brought forth this matter is the only language this Commission should consider. (**Barrett, Christensen**)

Staff Analysis: The overall issue in the IDS Counterclaim involves the "adoption" language in the parties' Interconnection Agreement. In its 5th and 8th Affirmative Defenses and Exhibits of the Counterclaim, IDS alleges that BellSouth would not allow it to adopt deposit and/or billing provisions found in other Florida interconnection agreements. (Answer at ¶5) In their Briefs, each party provides argument on "adoptions" under Section 252 of the Act, although staff believes these arguments are not directly germane to this docket, since the provisions in effect on the date this docket was initiated remain the pertinent provisions for purposes of resolving this dispute. Each party argued the relevance of the pleading filed in Docket No. 040611-TP,[23] although staff does not believe that the language subject to the adoption by IDS in Docket No. 040611-TP has retroactive application, and thus, the language in that docket has no direct impact on the current dispute addressed herein. Moreover, any issues that IDS had in the past with BellSouth refusing an adoption request could have been brought to this Commission at that time. Staff will address the Section 252 adoption arguments in Docket No. 040611-TP.

Conclusion

The Commission should not grant the IDS Counterclaim. Staff does not believe that the language IDS seeks to adopt in Docket No. 040611-TP has retroactive application, and thus, has no direct impact on the current dispute addressed herein. Staff believes the language in-place on the date the Petitioner brought forth this matter is the only language this Commission should consider.

[23] On June 25, 2004, IDS filed a Request for Approval of Amendment to the existing IDS-BellSouth interconnection agreement (see Docket No. 040611-TP). IDS contends that the parties agreed to replace the current deposit provisions/requirements with those from an agreement BellSouth has with another carrier. By operation of law, an amendment is effective 90 days from the date filed; in this instance, September 23, 2004. In its Brief, BellSouth asserts that no such accord was reached. Docket No. 040611-TP will address this matter.

Issue 3: Should this docket be closed?

Recommendation: No. This docket should be remain open until a final deposit amount is determined or pending further proceedings. (Christensen)

Staff Analysis: If a person whose substantial interests are affected by the Commission's decision in Issues 1 and 2 files a protest within 21 days of the issuance of the proposed agency action (PAA) order, this docket should remain open pending further proceedings. If no person protests the PAA order, this docket should remain open pending the parties' resolution of the final deposit amount. Staff recommends that it be granted administrative authority to close this docket upon a letter from the parties indicating that the issue of the deposit amount has been resolved.