

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services.

DOCKET NO. 000475-TP
ORDER NO. PSC-01-2309-PCO-TP
ISSUED: November 21, 2001

ORDER GRANTING MOTION TO STAY

On April 21, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a complaint against Thrifty Call, Inc. (Thrifty Call). BellSouth alleges that Thrifty Call is intentionally and unlawfully reporting erroneous Percent Interstate Usage (PIU) factors to BellSouth in violation of BellSouth's Intrastate Access Tariff and the rules and regulations established by this Commission. BellSouth alleges that erroneous PIUs have resulted in the under-reporting of intrastate access terminating minutes to BellSouth, causing BellSouth financial harm. BellSouth has requested that we take all action appropriate to protect the company from further financial harm.

On May 16, 2000, Thrifty Call timely filed a Motion to Dismiss or, in the Alternative, to Stay BellSouth's complaint. On May 30, 2000, BellSouth timely filed a Response and Opposition to Thrifty Call's Motion to Dismiss or Stay.

On June 26, 2000, BellSouth filed a Motion for Leave to File Supplemental Authority in support of its opposition to Thrifty Call's motion to dismiss or stay. On July 10, 2000, Thrifty Call filed its Response and Opposition to BellSouth's Motion for Leave to File Supplemental Authority. On August 31, 2000, we issued Order No. PSC-00-1568-PCO-TP, denying Thrifty Call's Motion to Dismiss.

On July 11, 2001, the parties and our staff met in an issue identification conference, and the issues relevant to this proceeding were established.

On August 20, 2001, Thrifty Call filed a Motion to Stay or in the Alternative to Bifurcate the Proceedings. Thrifty Call first requests that the proceeding be stayed pending the outcome of its Petition for Declaratory Ruling to the Federal Communications

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Commission (FCC). There, Thrifty Call asks the FCC to clarify four points: 1) whether the jurisdictional report verification procedures and protections contained in BellSouth's Tariff F.C.C. No.1, Sections 2.3.10(B) to 2.3.10(D), are binding on BellSouth, and what procedures and remedies apply if BellSouth wishes to formally contest a submitting interexchange carrier's (IXC) percentage interstate usage; 2) that BellSouth must abide by its FCC tariff regarding mandatory audits and the utilization of a revised PIU; 3) that discrepancies between the reported and audited PIU shall be resolved based upon the terms of the FCC tariff; and 4) that traffic is appropriately classified as intrastate or interstate based upon the FCC's entry/exit surrogate (EES) method referenced in BellSouth's FCC tariff.

Thrifty Call asserts that this proceeding has one central issue: What is the appropriate PIU to be applied to the traffic that Thrifty Call terminated to BellSouth? Thrifty Call's position is that the FCC is the entity charged with determining what constitutes interstate usage, and its determination is binding upon us in our application of the PIU at issue in this case. Thrifty Call believes that under well established law, BellSouth must act pursuant to its tariff, and any ambiguity should be construed against BellSouth. Both BellSouth's FCC tariff and its Florida Access Services Tariff dictate that the total percent interstate usage and the concomitant percent intrastate usage must sum to 100 percent. Therefore, argues Thrifty Call, a determination of the interstate switched access usage by the FCC will automatically establish the amount of intrastate usage.

Thrifty Call also claims that the FCC's interpretation of the interstate tariff regarding the appropriate PIU audit and backbilling provisions will be dispositive of the legal issues in this case. Thrifty Call further believes that waiting on the FCC's ruling will obviate the possibility of conflicting state and federal rulings, and will conserve Commission resources.

As an alternative to the stay, Thrifty Call seeks bifurcation of the legal and factual issues of the case, with the legal issues being heard first. Five issues have been identified in this case:

Issue 1. What is the Florida PSC's jurisdiction in this matter?

Issue 2. What are the terms and conditions of tariff associated with correcting and backbilling misreported PIU?

Issue 3. Has BellSouth complied with its tariff provisions?

Issue 4. Has Thrifty Call misreported its PIU to BellSouth?

Issue 5. If Thrifty Call has misreported its PIU to BellSouth, what amount, if any, does Thrifty Call owe BellSouth?

The first two issues are legal issues. Thrifty Call believes that the answers to these issues form the framework for answers to the remaining issues, or decide whether they remain issues in this proceeding at all. As such, Thrifty Call argues that bifurcation offers judicial economy, a reduction in the time imposition on the parties, and enhances the prospect of settlement between the parties.

On September 4, 2001, BellSouth filed its Opposition to Thrifty Call's Motion to Stay or, in the Alternative, to Bifurcate the Proceedings. BellSouth asserts that the fundamental error in Thrifty Call's motion is that Thrifty Call believes the issues in this case are governed by BellSouth's federal tariff, rather than BellSouth's intrastate tariff. BellSouth contends that the issue has been addressed previously by the FCC in In the Matter of LDDS Communications, Inc. v. United Telephone of Florida, 15 FCC Rcd 4950, 2000 WL 253661(F.C.C.) (rel. March 8, 2000). There, the FCC ruled:

Where the fundamental issue raised in the PIU dispute was the proper payment of intrastate access charges . . . the relationship between interstate and intrastate minutes of use does not subject to federal law, and the terms of the interstate tariff, all changes in a carrier's minutes of intrastate use. Rather, the traffic measurements process identifies the jurisdiction to which an IXC's traffic is assigned. Once that assignment has been accomplished, it is the appropriate tariff, as construed and applied by

the proper regulatory authority, that governs the process for charging for minutes of use. In light of this regulatory structure, LDDS's complaint is properly viewed as challenging the two separate calculations - performed under two different tariffs - that resulted in United's retroactive adjustment of the access charge liability. The first transaction is the reduction of the carriers' interstate access-charge liability. To the extent that LDDS challenges this transaction, it challenges an access-charge calculation made under a tariff filed with the FCC and over which the Commission certainly has jurisdiction. On the other hand, the second transaction is plainly outside of the Commission's jurisdiction. In calculating the new intrastate access charges, United applied the terms of its intrastate tariff to the revised figure for intrastate minutes of use. Under the Act's dual-track system, this transaction falls squarely within the, jurisdiction of the Florida PSC; as such, it is beyond the jurisdiction of the Commission.

Id. at ¶¶ 10-12.

BellSouth argues that from a jurisdictional perspective, its dispute with Thrifty Call is indistinguishable from the LDDS-United dispute. BellSouth believes the dispute is governed solely by its Florida tariff, and therefore, there is no legitimate reason for the progress of this case to be delayed.

In addressing Thrifty Call's request for bifurcation, BellSouth points out that nearly every case addressed by us raises both legal and factual issues. BellSouth believes that Thrifty Call seeks to delay the resolution of this case for as long as possible, by addressing a few issues at a time. BellSouth argues that if Thrifty Call believes that the Commission has no jurisdiction over this matter, the proper avenue for addressing that claim is a motion to dismiss.

Decision

Thrifty Call's argument in support of a stay of this proceeding rests on its submission of a Petition for Declaratory Ruling to the FCC, and its assertion that the answers to questions raised there are essential to the advancement of this proceeding.

The fundamental issue in this case, as it was in LDDS, is the determination of the appropriate intrastate access charges. The outflow of this determination does not automatically wed intrastate usage to an interstate tariff. Here, BellSouth seeks to challenge the PIU because it leads to the possible under-reporting of intrastate terminating access minutes terminated to BellSouth. Jurisdictional report verification procedures and protections as raised by Thrifty Call and contained in BellSouth's Tariff FCC No. 1, Sections 2.3.10(B) to 2.3.10(D), and which specify procedures and remedies available, are instructive where the challenge's primary focus is interstate usage. They are not instructive where the primary focus is intrastate usage. As such, the provisions of BellSouth's FCC tariff outlined above are not pertinent to the issue at hand.

The second question raised is similarly answered. Where the challenge is directed to the reporting of interstate access minutes, the applicable provisions of the federal tariff regarding audit procedures and the utilization of a revised PIU ultimately hold sway. There is, however, no need to wait for an FCC determination of this issue where it is the intrastate access minutes which are in question.

Such is also the case with the third question brought before the FCC by Thrifty Call. Discrepancies between the reported PIU (interstate) and the audited PIU, are properly resolved by looking at the provisions of BellSouth's federal tariff. Where the subject of the discrepancy being questioned is intrastate usage, it is entirely appropriate to look to the provisions of BellSouth's Florida tariff for the resolution of discrepancies in reported usage and an audited PIU(intrastate).

As for the fourth question regarding the appropriate application of the Commission's EES methodology to calls originated by third party IXCs, this question serves to classify and define

interstate or intrastate traffic. The answer to this question goes directly to the crux of the matter before this Commission. As noted by the FCC in LDDS, ". . .the traffic measurements process identifies the jurisdiction to which an IXC's traffic is assigned. *Once that assignment has been accomplished, it is the appropriate tariff, as construed and applied by the proper regulatory authority, that governs the process for charging for minutes used.*" Id. at 4955 (emphasis added). The assignment of that measurement is within the purview of the FCC, and is also the basis used by BellSouth within its Florida Tariff for ultimately determining the appropriate PIU(intrastate). Section E2.3.14 A.1. of the Florida Tariff states that the I.C. and/or End User shall compute the PIU using the following formula (rounded to a whole percentage):

$$\begin{array}{rcc} \text{Total Interstate} & + & \text{Total Interstate} \\ \text{Originating Minutes} & & \text{Terminating Minutes} \\ \hline \text{Total} & + & \text{Total} \\ \text{Originating Minutes} & & \text{Terminating Minutes} \end{array}$$

Section E2.3.14. A.1.a. further states that the intrastate usage is to be developed as though every call that originates within the same state as that in which the called station(as designated by the called station number) is situated is an intrastate communication, and every call for which the point of origination is in a state other than that where the called station (as designated by the called number) is situated is an interstate communication.

BellSouth's Florida Tariff, at Section E2.3.14 A.1.b., further requires that when the IC and/or End User computes the PIU, it shall subtract the developed percentage from 100 and the difference *is the percent intrastate usage*. The sum of the interstate and intrastate percentages shall equal 100 percent. Section E2.3.14. A.1.b.(emphasis added)

BellSouth's tariff uses the interstate minutes as the basis for computing the intrastate usage. By requiring the sum of the percentages of interstate and intrastate minutes to equal 100, its position is that anything that is not interstate, is intrastate. Therefore, fundamental to the application of the equation is the

correct interpretation of interstate minutes and whether BellSouth's interpretation of interstate usage in its tariff comports with the FCC's Memorandum Opinion and Order, 57 Rad. Reg. 2d (P&F) 1573. recon. denied, Memorandum Opinion and Order on Reconsideration, 59 Rad. Reg. 2d (P&F)631(1985). There, the FCC delineated the appropriate method of jurisdictional separations for certain access traffic, and BellSouth's federal tariff calls for the use of this method of jurisdictional separations for the access services purchased by Thrifty Call. Within the intrastate tariff, there is also a clear difference in the interpretation of the terms "originates", and "point of origination", between the parties. BellSouth views the terms as relating to the retail customer, while Thrifty Call interprets them as the point traffic enters Thrifty Call's network. The FCC's determination on the above issue could be persuasive in our application of the intrastate tariff.

As such, I find it appropriate and in the interest of judicial economy, to stay this proceeding until the FCC issues a ruling on question number four of the Petition for Declaratory Ruling submitted by Thrifty Call.

Given the above determination, it is not necessary to address Thrifty Call's request for bifurcation. I will, however, offer some clarifying guidance for the progression of this proceeding. As noted in Order No. PSC-00-1568-PCO-TP, Commission staff may conduct an audit in this proceeding. That audit has commenced, and will not be affected by the ruling on the Motion to Stay. I emphasize that our staff's discretion as to the time period it seeks to review under its own audit is not limited by the tariff. However, the proper recovery period based on the tariff will be determined by this Commission in our ultimate resolution of Issue 5 in this proceeding.

Based on the foregoing, it is

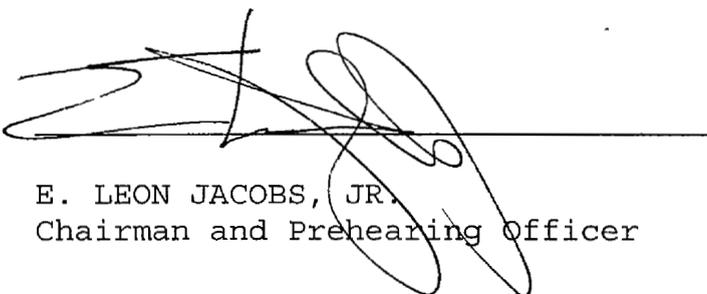
ORDERED by the Florida Public Service Commission that Thrifty Call Inc.'s Motion to Stay or in the Alternative to Bifurcate, is granted as set forth in the body of this Order. It is further

ORDERED that the staff audit commenced in relation to this proceeding will not be affected by this ruling. It is further

ORDER NO. PSC-01-2309-PCO-TP
DOCKET NO. 000475-TP
PAGE 8

ORDERED that this docket shall remain open.

By ORDER of Chairman E. Leon Jacobs, Jr. as Prehearing Officer, this 21st Day of November, 2001.



E. LEON JACOBS, JR.
Chairman and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric,

ORDER NO. PSC-01-2309-PCO-TP
DOCKET NO. 000475-TP
PAGE 9

gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.