Legal Department

JAMES MEZA III
Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

April 24, 2002

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

Re: Docket No. 011374-TP
Complaint Against VarTec Telecom
and Clear Choice Communications ("VarTec")

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to VarTec Telecom, Inc.'s Motion to Dismiss Complaint, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III

James Meza III
(24)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
Docket No. 011374-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

(*) Electronic Mail and U.S. Mail this 24th day of April, 2002 to the following:

Jason Fudge, Staff Counsel (*)
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6236
Fax. No. (850) 413-6250
jfudge@psc.state.fl.us

Ms. Carol Even (*)
VarTec Telecom, Inc.
1600 Viceroy Drive
Dallas, TX 75235-2306
Tel. No. (214) 424-1514
Fax. No. (214) 424-1510
creven@vartec.net

Kenneth A. Hoffman, Esq. (*)
Martin P. McDonnell, Esq. (*)
Marsha E. Rule, Esq. (*)
Rutledge, Ecenia, Purnell &
Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302
Tel. No. (850) 681-6788
Fax. No. (850) 681-6515
Ken@reuphlaw.com
martin@reuphlaw.com
marsha@reuphlaw.com
Attys. for VarTec

James U. Troup
James H. Lister
McGuire Woods LLP
1050 Connecticut Avenue
Suite 1200
Washington, D.C. 20036-5317
Tel. No. (202) 857-1700
Fax. No. (202) 857-1737
Attys. for VarTec

James Meza III
(28)

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint by BellSouth Telecommunications, Inc. against VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services.	Docket No. 011374-TP
	Filed: April 24, 2002

BELLSOUTH TELECOMMUNICATIONS, INC.'S OPPOSITION TO VARTEC TELECOM, INC.'S MOTION TO DISMISS COMPLAINT

Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") hereby files its opposition to Defendant VarTec Telecom, Inc.'s ("VarTec") Motion to Dismiss Complaint. VarTec's Motion should be denied for two independent reasons. First, it is clear, based upon Florida Public Service Commission and federal court precedent, as well as the relevant Florida statutes, that the Complaint seeks relief and sets forth a dispute of the type that the Commission has the authority to adjudicate and that the Commission regularly resolves. Second, BellSouth's Complaint meets the Commission's pleading requirements and provides VarTec with sufficient notice of the allegations against it.

I. INTRODUCTION AND FACTUAL BACKGROUND

VarTec is an interexchange carrier ("IXC") that compensates BellSouth, as the local exchange carrier, for intrastate terminating access services in Florida pursuant to BellSouth's Florida access services tariff on file with the Commission. *See* Compl. ¶¶ 1-5. During the relevant time period, BellSouth relied on VarTec to accurately report its terminating percentage of interstate usage ("PIU"), so that BellSouth could charge VarTec the interstate rate for its minutes of interstate

access, and the intrastate rate for its minutes of intrastate access pursuant to BellSouth's tariff.[1] *See* Compl. ¶¶ 5-7.

In 2000, BellSouth installed new computer equipment that allows it determine the terminating PIUs of its customers without relying on the customers' PIU reports. *See* Compl. ¶¶ 7-8. Based upon a review of VarTec's call activity records using this computer system, BellSouth determined that VarTec had misreported its PIU factors to BellSouth during the period from 1994 to 2000, thereby resulting in BellSouth under-billing, and VarTec under-paying, for intrastate access services in the amount of $2,150,626, excluding late fees. *See* Compl. ¶ 12. BellSouth demanded payment from VarTec for the under-reported intrastate usage, and VarTec refused to pay. *See* Compl. ¶ 12, 13. Accordingly, BellSouth filed this Complaint before the Commission seeking interpretation and enforcement of the terms of its tariff and an order requiring VarTec to pay sums that should have been paid but were not, due to VarTec's misreporting. *See* Compl. ¶ 14.[2]

VarTec removed this case to the United States District Court for the Northern District of Florida (the "Florida District Court") on November 13, 2001.

---

[1] This reporting requirement is set forth in Sections E2.3.14(A) and (B) of BellSouth's Florida Access Services Tariff.

[2] BellSouth's Complaint against VarTec is based on essentially the same facts and legal issues as those involved in its claims against two other IXCs, Thrifty Call, Inc. and Intermedia Communications, Inc. ("Intermedia"), that are, or were, pending before the Commission. *See* Order No. PSC-01-1749-PCO-TP, *Order Establishing Procedure* (Fla. Pub. Serv. Comm'n Aug. 28, 2001) (hereinafter "*Florida Thrifty Call Order*") (attached as Exhibit A); Order No. PSC-01-2034-FOF-TP, *Order on Dismissal* (Fla. Pub. Serv. Comm'n Oct. 15, 2001) (granting BellSouth's voluntary dismissal) (hereinafter "*Florida Intermedia Order*") (attached as Exhibit B).

BellSouth filed a Motion to Remand, arguing, *inter alia*, that removal from an administrative agency like the Commission was impermissible and that, because of its special expertise, the Commission was the best forum for resolution of the PIU dispute. On February 14, 2002, the Florida District Court granted BellSouth's Motion to Remand. *See BellSouth Telecomms., Inc. v. VarTec Telecom, Inc.*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002) (hereinafter "*Order of Remand*") (attached as Exhibit C). Having failed to convince the Florida District Court that this dispute is not properly before the Commission, VarTec filed a Motion to Dismiss Complaint with the Commission on March 29, 2002. For the reasons set forth below, this Commission should deny VarTec's Motion.

II. ARGUMENT AND CITATION OF AUTHORITY

A. BellSouth's Complaint States A Claim For Enforcement Of BellSouth's Tariff, Over Which The Commission Has Jurisdiction And Pursuant To Which The Commission May Order Relief

The Commission has the authority to resolve the dispute over BellSouth's intrastate access tariff, including ordering back payments owed due to incorrect PIU reporting. VarTec tries to avoid this inescapable conclusion by attempting to characterize BellSouth's claim as a civil suit for money damages over which, VarTec argues, the Commission lacks jurisdiction.[3] Despite VarTec's attempt to

---

[3] VarTec apparently attempts to take advantage of a line of cases that it contends stands for the proposition that suits for money damages are beyond the Commission's jurisdiction. *See* Mot. to Dismiss ¶¶ 3-4, 6-10. These cases are easily distinguishable as most of them arise in an entirely different context, either seeking general tort damages for negligence or enforcement of certain terms of an agreement through a petition for arbitration under the Telecommunications Act, as opposed to interpretation and enforcement of a tariff. *See, e.g., S. Bell Tel. & Tel. Co. v. Mobile Am. Corp.*, 291 So. 2d 199 (Fla. 1974) (rejecting a mobile home sales company's tort claim for an award of damages for alleged past inadequacies of telephone service); Order No. PSC-99-1054-FOF-EI, *Order Denying Complaint and Dismissing Petition* (Fla. Pub. Serv.

recast BellSouth's Complaint, the relief BellSouth seeks falls squarely within the Commission's jurisdiction to interpret and enforce tariffs. Indeed, the Commission's authority has been recognized by the Commission itself, as well as other courts, and is clearly contemplated by the broad statutory scheme governing telecommunications companies. Likewise, other state utility commissions regularly assert their jurisdiction in similar disputes. Accordingly, as set forth in greater detail below, BellSouth's Complaint states a cause of action upon which relief can be granted.

1. The Commission And Florida District Court Have Already Determined That The Commission Is The Appropriate Forum To Resolve This Dispute

VarTec's Motion completely ignores the fact that the Commission has exercised its jurisdiction to adjudicate disputes based on virtually identical claims brought by BellSouth against other IXCs for violation of BellSouth's intrastate access tariff. Indeed, in a matter currently pending before the Commission, BellSouth alleged that IXC Thrifty Call intentionally and unlawfully reported erroneous PIU figures to BellSouth in violation of BellSouth's intrastate access tariff and the rules and regulations established by the Commission. *See Florida Thrifty Call Order* at 1, Exhibit A. In a complaint virtually indistinguishable from that filed against VarTec, BellSouth alleged that erroneous PIU reporting by Thrifty Call had resulted in the under-reporting of (and the under-payment for)

Comm'n May 24, 1999) (dismissing claims for monetary damages based on assertions of tortuous liability or criminal activity by a carrier's employees); Order No. PSC-96-1321-FOF-TP, *Order Granting Motion to Dismiss* (Fla. Pub. Serv. Comm'n Oct. 30, 1996) (granting motion to dismiss petition to arbitrate certain terms and conditions of the parties' interconnection and resale agreement since imposition of the proposed

intrastate terminating access minutes, and requested that the Commission take appropriate action to interpret and enforce the tariff. *Id.* In setting the *Thrifty Call* case for an administrative hearing, the Commission unequivocally stated that it is "*vested with jurisdiction over these matters* pursuant to Sections 364.058, 364.07(2) and 364.27, Florida Statutes." *Florida Thrifty Call Order* at 1, Exhibit A (emphasis added).

Similarly, the Commission exercised its jurisdiction over BellSouth's complaint against IXC Intermedia, which, like BellSouth's Complaint against VarTec, alleged a similar misreporting of PIU, resulting in Intermedia's under-payment for its intrastate terminating access minutes to BellSouth. *See Florida Intermedia Order* at 1, Exhibit B. Again, this Commission expressly recognized that "*[w]e are vested with jurisdiction over this matter* pursuant to Sections 364.07(2) and 364.27, Florida Statutes." *Florida Intermedia Order* at 1, Exhibit B (emphasis added). There can be no clearer evidence of the Commission's authority to adjudicate and provide relief for the issues raised in BellSouth's Complaint than the Commission's own assertion of such jurisdiction in identical cases.[4]

In addition, the Florida District Court, in granting BellSouth's Motion to Remand this matter to the Commission, recognized the Commission's authority

---

liquidated damages provision was beyond the scope of the Commission's arbitration responsibilities under sections 251 and 252 of the Telecommunications Act of 1996).

[4] The Commission's exclusive jurisdiction over telecommunications companies authorizes it "to interpret statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly." *Fla. Pub. Serv. Comm'n v. Bryson*, 569 So. 2d 1253, 1255 (Fla. 1990) (concluding that since the Commission had at least a "colorable claim" of jurisdiction over the complaint, the circuit court lacked jurisdiction to proceed).

to resolve disputes regarding back payments under BellSouth's tariff. *See Order of Remand,* Exhibit C. Like the Commission in *Thrifty Call* and *Intermedia*, the Florida District Court recognized the statutory basis for this authority and concluded:

> Indeed, the Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. § 364.07 (2001), not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in different court; instead, it afforded a remedy in a different type of forum altogether. In such proceedings, the competence brought to bear will not be that of a court, but of a regulator. When BellSouth opted to bring its claim against VarTec to the Commission, it elected an administrative remedy before a regulatory body, not a civil action in a court.

Order of Remand at 1283-84, Exhibit C (footnote omitted). As acknowledged by the Florida District Court, this is precisely the type of dispute that the legislature intended this Commission to resolve.

2. The Florida Statutes Governing Telecommunications Companies Provide The Commission With The Authority To Resolve BellSouth's Complaint

As the Commission and Florida District Court have acknowledged, Section 364.07(2) of the Florida Statutes grants the Commission the power to resolve this type of dispute. Section 364.07(2) provides that "[t]he commission is also authorized to adjudicate disputes among telecommunications companies regarding such contracts [for joint provision of intrastate interexchange service] or the enforcement thereof." Fla. Stat. Ann. § 364.07(2). Clearly, the BellSouth access services tariff falls within the parameters of section 364.07(2). *See, e.g., Florida Thrifty Call Order,* Exhibit A; *Florida Intermedia Order*, Exhibit B. Not only

does the Commission-approved tariff have the force and effect of law, but, like a contract, it also controls the rights and liabilities between BellSouth and VarTec as to the provision of intrastate interexchange service in Florida. *See Bella Boutique Corp. v. Venezolana Internacional de Avicion S.A.*, 459 So. 2d 440, 441 (Fla. Dist. Ct. App. 1984) (noting that a tariff "constitutes the contract of carriage between the parties and conclusively and exclusively governs the rights and liabilities between the parties"); *see also* Fla. Stat. Ann. § 364.04(1) ("Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges of that company for service to be performed within the state."); Fla. Admin. Code Ann r. 25-4.034 (requiring telecommunications companies to file tariffs setting forth all rates for services, as well as the general rules and regulations governing such service, with the Commission).

In addition to the specific grant of authority under section 364.07(2), the Florida legislature granted the Commission exclusive jurisdiction to regulate telecommunications carriers. Fla. Stat. Ann. § 364.01 ("It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies . . . ."). To aid the Commission in fulfilling this mandate, the legislature has provided it with the power to conduct limited or expedited proceedings "to *consider and act upon* any matter within its jurisdiction." Fla. Stat. Ann. § 364.057 (emphasis added). The Commission's rules and orders, including with respect to approval

and enforcement of tariffs, may be enforced in the circuit court by the Commission or by any substantially interested person. *See* Fla. Stat. Ann. §§ 120.69, 364.015.[5] The Commission also has the power to impose monetary penalties upon any entity subject to its jurisdiction that has refused to comply with or violated any Commission rule or order. Fla. Stat. Ann. § 364.285. This statutory framework provides the Commission with broad authority to resolve disputes such as the current matter, including the ability to issue orders granting the specific relief requested by BellSouth.[6]

In keeping with its broad authority, the Commission has recognized that it has the "authority, under proper circumstances, to require refunds or impose regulatory penalties" even if it cannot award compensatory damages. Order No. PSC-94-0716-FOF-TL, *Notice of Proposed Agency Action Resolving Customer*

---

[5] *See Order of Remand* at 1284, Exhibit C (noting that Fla. Stat. Ann. § 364.015 provides the enforcement mechanism for the Commission's orders). *See also Century Utils., Inc. v. Palm Beach County*, 458 So. 2d 1178 (Fla. Dist. Ct. App. 1984) (reviewing petition for enforcement filed by Department of Environmental Regulation to enforce a consent order issued by the Department); *Stuart v. State ex rel. Miller*, 629 So. 2d 288 (Fla. Dist. Ct. App. 1993) (dismissing administrative enforcement action by private citizen since there was no "agency action" under 120.69(1)(b)).

[6] The exclusive authority over telecommunications companies necessarily includes powers that are not specifically enumerated in the statutes. *See, e.g., Teleco Communications Co. v. Clark*, 695 So. 2d 304, 309 (Fla. 1997) (affirming Commission's authority to transfer title to a wire to another telecommunications carrier, based on its exclusive jurisdiction to protect the public health, safety and welfare of Florida residents by ensuring uninterrupted telecommunications service under section 364.01(3)(a)); *Fla. Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248, 250-51 (Fla. 1993) (the Commission's general authority to regulate telephone companies under section 364.01 provided it with the jurisdiction to reclassify local routes under a tariff, despite the absence of a specific statutory provision authorizing such an order); *see also Gulf Coast Elec. Coop. v. Johnson*, 727 So. 2d 259, 263 (Fla. 1999) (holding that while the Commission lacked the explicit statutory authority to impose territorial boundaries for electrical service, the Commission's implicit authority to do so was derived from two separate jurisdictional provisions, specifically, its jurisdiction to approve territorial agreements and its jurisdiction to resolve territorial disputes).

Complaint (Fla. Pub. Serv. Comm'n June 9, 1994). In fact, in adjudicating disputes between carriers over reciprocal compensation under interconnection agreements, the Commission has ordered a carrier to "compensate the complainants, according to the interconnection agreements, including interest, for the entire period the balance owed is outstanding." Order No. PSC-98-1216-FOF-TP, *Final Order Resolving Complaints* (Fla. Pub. Serv. Comm'n Sept. 15, 1998); *see also* Order No. PSC-02-0484-FOF-TP, *Order Granting BellSouth's Motion for Extension of Time, Denying Supra Motion to Dismiss, and Denying BellSouth's Motion to Strike* (Fla. Pub. Serv. Comm'n Apr. 8, 2002) (rejecting motion to dismiss for lack of subject-matter jurisdiction in a billing dispute based on a resale agreement). Furthermore, Florida courts regularly uphold decisions by the Commission that have resolved customer complaints against utilities by ordering a refund for overcharges. *See, e.g., Sunshine Utils. v. Fla. Pub. Serv. Comm'n*, 577 So. 2d 663 (Fla. Dist. Ct. App. 1991); *Richter v. Fla. Power Corp.*, 366 So. 2d 798 (Fla. Dist. Ct. App. 1979).

Florida's comprehensive statutory framework governing telecommunications companies, including the interpretation and enforcement of tariffs, provides the Commission with ample power to resolve the dispute over BellSouth's tariff and afford the relief requested in BellSouth's Complaint. Accordingly, BellSouth has stated a cause of action upon which the Commission may grant relief.

B. The Commission Has The Authority To Grant The Requested Relief In This Case

If the Commission determines that VarTec under-reported and thus under-paid BellSouth for its intrastate terminating access, the Commission has the authority to enter an order to that effect. The North Carolina Utilities Commission's ("NCUC") issued just such an order in a virtually identical dispute brought by BellSouth against Thrifty Call based upon Thrifty Call's misreporting of its PIU factors in North Carolina. First, the NCUC correctly determined that it had the authority to interpret and enforce BellSouth's tariff, and order payments if appropriate.[7] In denying Thrifty Call's motion for reconsideration and stay of discovery, the NCUC adopted "the reasons as generally set forth by BellSouth." *North Carolina Thrifty Call Order* at 4, Exhibit D. As outlined by BellSouth:

> What BellSouth seeks from this Commission is enforcement of its tariff. The relief sought by BellSouth is analogous to CLPs seeking enforcement of the reciprocal compensation provisions of interconnection agreements for ISP traffic. As with ISP traffic, if the Commission believes that the enforcement of the tariff entitled BellSouth to back payments, the [NCUC] has taken the position that it has the authority to award back payments.[8]

Second, the NCUC ultimately determined that "Thrifty Call shall pay BellSouth the amount of $1,898,685, representing the amount of intrastate

---

[7] Order Denying Motion for Reconsideration and Granting Motion for Procedural Order, *In the Matter of BellSouth Telecomms., Inc. v. Thrifty Call, Inc.*, N.C. Utils. Comm'n Docket No. P-447, Sub 5, Aug. 11, 2000 (hereinafter "*North Carolina Thrifty Call Order*") (attached as Exhibit D).

[8] BellSouth Telecommunications, Inc.'s Response to Motion for Reconsideration and Request for Stay of Discovery, *In the Matter of BellSouth Telecomms., Inc. v. Thrifty Call, Inc.*, N.C. Utils. Comm'n Docket No. P-447, Sub 5, Aug. 8, 2000 (attached as Exhibit E).

access charges Thrifty Call should have paid."[9] In addressing the damages argument, the NCUC stated:

> Thrifty Call has questioned the [NCUC's] authority to award backbilling in this proceeding because BellSouth has allegedly not supported its calculation of the $1,898,685 in "unbilled access charges" and is in any case limited by its tariffs, any deviation from which would constitute an award of damages. On the contrary, the [NCUC] believes that the $1,898,695 is well supported. . . . *The [NCUC's] authority to require the payment of sums that should have been paid but were not because of inappropriate classification is well-established and does not constitute an award of damages.*

North Carolina Thrifty Call Award Order at 5, Exhibit F (emphasis added).

Like the NCUC, the Florida Commission also has the authority "to require the payment of sums that should have been paid but were not because of inappropriate classification." *North Carolina Thrifty Call Award Order* at 5, Exhibit F. The Commission's statutory authority to interpret and enforce BellSouth's tariff necessarily includes the authority to order the payment of sums due under the tariff.

Like the NCUC, other public service commissions have rejected the arguments asserted by VarTec and ordered telecommunications providers to pay sums due under agreements or tariffs. For example, the Georgia Public Service Commission ("GPSC") upheld a hearing officer's decision that BellSouth should compensate MFS/WorldCom based on the parties' interconnection agreement. *MFS Intelenet of Ga., Inc. v. BellSouth Telecomms., Inc.*, Docket No. 8196-U

---

[9] Recommended Order Ruling on Complaint, *In the Matter of BellSouth Telecomms., Inc. v. Thrifty Call, Inc.*, N.C. Utils. Comm'n Docket No. P-447, Sub 5, April 11, 2001 (hereinafter "*North Carolina Thrifty Call Award Order*"), *adopting all finding of fact and conclusions*, Final Order Denying Exceptions and Affirming Recommended Order, N.C. Utils. Comm'n Docket No. P-447, Sub 5, June 14, 2001 (both attached as Exhibit F).

(Ga. Pub. Serv. Comm'n Dec. 15, 1998) (hereinafter "*Georgia MFS Intelenet Order*") (attached as Exhibit G). The GPSC determined that it had the authority to construe the parties' contract and order compliance with its prior order approving the agreement:

> Inherent in the Commission's authority to enforce the interconnection agreement is the authority to order parties to that agreement to fulfill the obligations to remit compensation required under the agreement. Moreover, without such authority, the Commission's power to approve the agreement would be useless because the parties would be under no obligation to honor the terms of the approved agreement.

Georgia MFS Intelenet Order at 7, Exhibit G. The GPSC's logic applies with equal force in the case at hand.[10]

In sum, the Commission's approval of BellSouth's access services tariff means nothing without the power to interpret and enforce the tariff. Taken to its logical extreme, VarTec's argument regarding the relief BellSouth seeks would mean that any time a telecommunications company owes money to another provider by virtue of a prior Commission rule or order, the Commission would not have the authority to enforce its own rule or order, and to order payment of that money. The statutory scheme governing telecommunications companies clearly

---

[10] To the extent that subsequent case law casts doubt on the force of the GPSC's authority to adjudicate disputes arising out of previously-approved interconnection agreements, *see BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 278 F.3d 1223 (11th Cir. 2002), this case law does not address the GPSC's ability to enforce its resolution of disputes properly within its jurisdiction. Moreover, such case law has been distinguished by this Commission, which has found that it has the statutory authority to resolve disputes over interconnection agreements, which necessarily includes the issuance of enforcement orders by the Commission. *See* Order No. PSC-02-0484-FOF-TP, *Order Granting BellSouth's Motion for Extension of Time, Denying Supra Motion to Dismiss, and Denying BellSouth's Motion to Strike* at 21-24 (Fla. Pub. Serv. Comm'n Apr. 8, 2002).

mandates otherwise and provides the Commission with the power to resolve BellSouth's Complaint.

C. Because The Dispute Over BellSouth's Tariff Is A Matter Within The Commission's Jurisdiction, The Right To A Jury Trial Is Not Applicable

In yet another attempt to deprive this Commission of authority over a dispute clearly within its jurisdiction, VarTec argues that BellSouth's claim against it cannot be determined by the Commission because VarTec would deprived of its Seventh Amendment right to jury trial. This red-herring argument is easily dismissed. It is axiomatic that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) (citing *Block v. Hirsh*, 256 U.S. 135 (1921)). *See also* 2 Am. Jur. 2d *Administrative Law* § 4 (1994) ("[T]he right to jury trial in suits at common law preserved by the Seventh Amendment is generally inapplicable in administrative proceedings.") (citations omitted); 4 Jacob A. Stein et al., Administrative Law §32.02[2] (1977 & Supp. 1999) ("It has been decided that there is no right to a jury trial in administrative hearings.") (citations omitted); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 448 (1977) ("Where adjudicative responsibility rests only in the administering agency, jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the agency's role in the statutory scheme.") (citation omitted).

Nothwithstanding VarTec's characterization of BellSouth's claim, "the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved." *Atlas Roofing*, 430 U.S. at 460-61; *see also Golden Dolphin No. 2, Inc. v. State Div. of Alcoholic Beverages & Tobacco*, 403 So. 2d 1372, 1374 (Fla. Dist. Ct. App. 1981) (acknowledging that since the proceeding was a civil administrative hearing, there was no right to a jury trial). Here, the comprehensive statutory scheme governing telecommunications companies, not the common law, both creates BellSouth's tariff obligations and provides the Commission with the statutory authority to resolve disputes over its enforcement. *See, e.g., J.B. Green Realty Co. v. Fla. Real Estate Comm'n ex rel. Warlow*, 177 So. 535, 538 (Fla. 1937); *Robins v. Fla. Real Estate Comm'n*, 162 So. 2d 535, 537-38 (Fla. Dist. Ct. App. 1964) (rejecting petitioner's argument that he was entitled to jury trial since the proceeding before the Florida Real Estate Commission "was not a judicial proceeding governed by the ordinary constitutional protections relative to jury trials"); *Fla. Indus. Comm'n v. Mason*, 151 So. 2d 874, 876-77 (Fla. Dist. Ct. App. 1963) (holding that a proceeding before the Florida Industrial Commission did not include the right to trial by jury). Because the Commission has been granted such authority, VarTec has no right to jury trial in this matter.

D. BellSouth's Complaint Complies With The Commission's Pleading Requirements And Provides VarTec With Sufficient Notice Of The Allegations Against It

VarTec's argument that BellSouth's Complaint should be dismissed for pleading deficiencies is also without merit. Under Rule 25-22.036 of the Florida Administrative Code, a complaint is appropriate to initiate formal proceedings when a telecommunications company "complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is a violation of a statute enforced by the Commission, or of any Commission rule or order." Fla. Admin. Code Ann r. 25-22.036(2). Additionally, such complaint must contain "the rule, order, or statute that has been violated" and the "actions that constitute the violation." Fla. Admin. Code Ann r. 25-22.036(3)(b).

BellSouth's Complaint complies with these minimal requirements. *See* Compl. ¶¶ 5, 7, 11-14. The Complaint clearly sets forth the terminating PIU reporting requirement under BellSouth's tariff and specifically alleges that "[b]ased on VarTec's misreported TPIU, BellSouth underbilled VarTec $2,150,626.00 for the period between 1994 and 2000 with respect to terminating access service provided in Florida." Compl. ¶¶ 5, 7, 12. Because BellSouth's Complaint alleges that VarTec violated the terms of BellSouth's tariff, which has the force of law, the Complaint satisfies the requirements of Rule 25-22.036. *See Bella Boutique Corp.*, 459 So. 2d at 441; Fla. Stat. Ann. § 364.04(1). As acknowledged by VarTec, *see* Mot. to Dismiss ¶¶ 12, 15, BellSouth's Complaint

also cites the statutory chapters that outline the Commission's exclusive jurisdiction over the parties to this dispute. *See* Compl. (opening paragraph).

Moreover, Rule 25-22.036 does not mandate dismissal or stricken pleadings for lack of specificity. In fact, the Commission has consistently refused to dismiss pleadings that have not entirely conformed with its rules. *See, e.g.,* Order No. PSC-96-0658-FOF-SU, *Order Denying Motion to Dismiss and Denying Motion to Assign the Case to the Division of Administrative Hearings* (Fla. Pub. Serv. Comm'n May 10, 1996) (refusing to dismiss response to motion to dismiss for failure to specifically comply with pleading requirements for notice and standing under a prior version of Rule 25-22.036); Order No. PSC-95-1576-FOF-WS, *Order Denying Motion to Dismiss* (Fla. Pub. Serv. Comm'n Dec. 20, 1995) (finding, under a prior version of Rule 25-22.036, that while a petition did not allege each specific disputed fact, it clearly protested the findings of the Commission and was therefore sufficient); Order No. PSC-95-0062-FOF-WS, *Order Granting Southern States Utilities, Inc.'s Motion to Dismiss* (Fla. Pub. Serv. Comm'n Jan. 11, 1995) ("[W]e have accepted amended objections in the past and have also accepted other pleadings which our rules do not contemplate . . . .").[11]

Likewise, Rule 1.110 of the Florida Rules of Civil Procedure merely requires that allegations of a complaint be sufficient to inform a defendant of the

---

[11] In the event BellSouth's Complaint does not conform with the Commission's pleading requirements, BellSouth hereby requests the opportunity to amend its Complaint to cure any procedural deficiencies. *See* Fla. Admin. Code Ann r. 28-106.202 (allowing a petitioner to amend its petition without leave prior to the designation of a presiding officer).

nature of the cause against it. *Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565 (Fla. 1971); *Wiggins v. State Farm Mut. Auto. Ins. Co.*, 446 So. 2d 184, 185 (Fla. Dist. Ct. App. 1984). BellSouth's Complaint clearly provides this notice. Indeed, VarTec's ability to file numerous motions and briefs addressing the issues raised in BellSouth's Complaint in four different jurisdictions, further demonstrates that BellSouth has satisfied this lenient notice pleading standard.[12]

III. CONCLUSION

For the reasons set forth above, BellSouth respectfully requests that the Commission deny VarTec's Motion to Dismiss Complaint.

---

[12] In addition to this action before the Commission, BellSouth has filed complaints based on the same dispute with VarTec before the utility commissions in North Carolina, Tennessee and South Carolina. As in Florida, VarTec filed notices of removal and lengthy oppositions to remand in each of these cases, addressing the substance of BellSouth's complaints and the utility commissions' jurisdiction. The United States District Court for the Eastern District of North Carolina has remanded BellSouth's case to the NCUC. The United States District Court for Middle District of Tennessee is currently considering BellSouth's Motion to Remand and VarTec's Motion to Stay Proceedings Pending Exhaustion of the Tariffed Audit Process, which attempts to refute in detail the substance of BellSouth's allegations, and BellSouth's opposition to such motion. The United States District Court for the District of South Carolina has not yet ruled on BellSouth's Motion to Remand to the state utility commission.

Respectfully submitted this 24th day of April, 2002.

Nancy B. White
James Meza III
c/o Nancy Sims
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301
(305) 347-5558

R. Douglas Lackey
675 West Peachtree Street, Suite 4300
Atlanta, Georgia 30309
(404) 335-0747

Wayne T. McGaw (La. Bar No. 9302)
365 Canal Street, Room 3060
New Orleans, Louisiana 70130
Telephone: (504) 528-2058
Fax: (504) 528-2948

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

444087

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-01-1749-PCO-TP ISSUED: August 28, 2001

ORDER ESTABLISHING PROCEDURE

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 the 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 the Commission 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, granting BellSouth's motion, and denying Thrifty Call's Motion to Dismiss. This matter is currently set for an administrative hearing.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.058, 364.07(2) and 364.27, Florida Statutes. Further, this Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which

Exhibit A

provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff up to and during the prehearing conference, unless modified by the Commission.

Discovery

When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

The hearing in this docket is set for April 4-5, 2002. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by Monday, March 28, 2002. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification. The discovery requests will be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Pursuant to Rule 28-106.206, Florida Administrative Code, unless subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 100, and requests for production of documents, including all subparts, shall be limited to 100.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the

information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, Florida Statutes.

Diskette Filings

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

Prefiled Testimony and Exhibits

Each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of the Commission Clerk and Administrative Services, by the close of business, which is 5:00 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

If a demonstrative exhibit or other demonstrative tools are to be used at hearing, they must be identified by the time of the Prehearing Conference.

Prehearing Statement

All parties in this docket shall file a prehearing statement. Staff will also file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of the Commission Clerk and Administrative Services by the close of business, which is 5:00 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

(a) The name of all known witnesses that may be called by the party, and the subject matter of their testimony;

(b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;

(c) a statement of basic position in the proceeding;

(d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(e) a statement of each question of law the party considers at issue and the party's position on each such issue;

(f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(g) a statement of issues that have been stipulated to by the parties;

(h) a statement of all pending motions or other matters the party seeks action upon;

(i) a statement identifying the parties' pending requests or claims for confidentiality; and

(j) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

(k) a statement identifying any decision or pending decision of the FCC or any court that has or may either preempt or otherwise impact the Commission's ability to resolve any of the issues presented or the relief requested in this matter.

(l) Any objections to a witness's qualifications as an expert must be identified in a party's Prehearing Statement. Failure to identify such objection may result in restriction of a party's ability to conduct voir dire.

Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held Friday, January 18, 2002, at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

Prehearing Procedure; Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate

to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

Document Identification

Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL
J. Doe Exhibit No. _____
Cost Studies for Minutes of Use by Time of Day

Tentative Issues

Attached to this order as Appendix "A" is a tentative list of the issues which have been identified in this proceeding. Prefiled

testimony and prehearing statements shall address the issues set forth in Appendix "A".

Controlling Dates

The following dates have been established to govern the key activities of this case.

1)	Direct testimony and exhibits - all	November 21, 2001
2)	Rebuttal testimony and exhibits	January 4, 2002
3)	Prehearing Statements	January 18, 2002
4)	Prehearing Conference	March 18, 2002
5)	Hearing	April 4-5, 2002
6)	Briefs	May 6, 2002

Use of Confidential Information At Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be

provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services's confidential files.

Post-Hearing Procedure

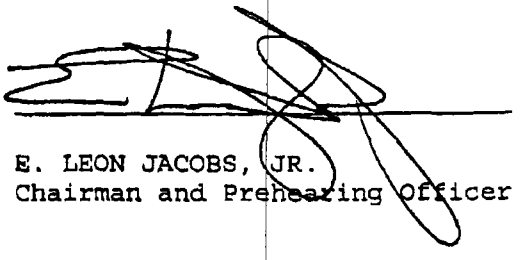
Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

Based upon the foregoing, it is

ORDERED by Chairman E. Leon Jacobs, Jr., as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Chairman E. Leon Jacobs, Jr. as Prehearing Officer, this 28th Day of August, 2001.



E. LEON JACOBS, JR.
Chairman and Prehearing Officer

(S E A L)

WDK

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, 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.

Attachment A
Tentative Issues List

A. [LEGAL ISSUE] What is the Commission's jurisdiction in this matter?

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

2 Has BellSouth complied with its tariff provisions?

3. Has Thrifty Call misreported its PIU to BellSouth?

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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by BellSouth Telecommunications, Inc. against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and National Telephone of Florida regarding the reporting of percent interstate usage for compensation for jurisdictional access services.	DOCKET NO. 000690-TP ORDER NO. PSC-01-2034-FOF-TP ISSUED: October 15, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
LILA A. JABER
MICHAEL A. PALECKI

ORDER ON DISMISSAL

BY THE COMMISSION:

On June 5, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a complaint against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc. and National Telephone of Florida (collectively Intermedia). In its complaint, BellSouth alleged that Intermedia had been reporting erroneous Percent Interstate Usage (PIU) factors to BellSouth, and that these erroneous PIUs had resulted in the under reporting of intrastate access terminating minutes to BellSouth. BellSouth requested that this Commission take all action appropriate to protect it from further financial harm.

On June 30, 2000, Intermedia timely filed a Motion to Dismiss or, in the alternative, to Stay BellSouth's complaint. BellSouth timely filed a Response and Opposition to Intermedia's Motion to Dismiss or Stay on July 12, 2001. By Order No. PSC-00-2081-PCO-TP, issued November 1, 2001, we denied Intermedia's Motion to Dismiss.

We are vested with jurisdiction over this matter pursuant to Sections 364.07(2) and 364.27, Florida Statutes.

Exhibit B

On July 20, 2001, BellSouth filed a Notice of Voluntary Dismissal, wherein it withdrew, with prejudice, its Complaint against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc. and National Telephone of Florida. There are no remaining issues in dispute between the parties in this docket. As such, we acknowledge BellSouth's withdrawal of its complaint against Intermedia, and close this docket.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth's Notice of Voluntary Dismissal of its complaint against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and National Telephone of Florida. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 15th day of October, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: _____
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

WDK

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

United States District Court,
N.D. Florida,
Tallahassee Division.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Plaintiff,
v.
VARTEC TELECOM, INC., etc., Defendant.

No. 4:01cv480-RH.

Feb. 14, 2002.

Local exchange telephone carrier brought administrative proceeding before Florida Public Services Commission, alleging that interexchange carrier overcharged it. Interexchange carrier removed case and local exchange carrier moved for remand. The District Court, Hinkle, J., held that Commission was not a "state court," for purposes of removal statute.

Remand motion granted.

West Headnotes

Removal of Cases 9
334k9 Most Cited Cases

Florida Public Service Commission was not a "state court," for purposes of removal to federal court of administrative proceeding by one telephone carrier alleging terminating access overcharges by second carrier, despite claim that Commission would be acting as court in resolving dispute in question. 28 U.S.C.A. § 1441(a).

***1281** Jerome Wayne Hoffman, Jere Lee Earlywine, Holland & Knight LLP, Tallahassee, FL, for plaintiff.

Stephen A. Ecenia, Martin Patrick McDonnell, Rutledge Ecenia Underwood, Tallahassee, FL, James H. Lister, James U. Troup, McGuire Woods, LLP, Washington, DC, for defendant.

ORDER OF REMAND

HINKLE, District Judge.

This is a dispute between two telecommunications carriers concerning the amount due from one to the other for terminating access charges. The proceeding was initiated by a complaint filed with the Florida Public Service Commission. It was removed to this court based on the assertion that a proceeding of this nature filed with the Commission is in substance a "civil action brought in a State court," within the meaning of the federal removal statute, 28 U.S.C. § 1441. I conclude that the Florida Public Service Commission is an administrative agency, and not a court, both generally and when addressing matters of this type, and that removal therefore was improper. I grant the pending motion for remand.

Background

BellSouth Telecommunications, Inc., is a local exchange carrier. Vartec Telecom, Inc., is an interexchange carrier. When Vartec carries an interexchange call, the call is terminated over the facilities of a local exchange carrier (in the instances at issue, BellSouth's). Vartec compensates the local carrier by means of a "terminating access charge" set forth in a federal tariff (for interstate calls) or state tariff (for intrastate calls). In Florida, BellSouth's intrastate terminating access charge is higher than the applicable interstate rate.

BellSouth asserts that Vartec has underpaid terminating access charges for the period 1994-2000 by incorrectly reporting its proportions of interstate and intrastate calls. BellSouth asserts it knows this because it now has the capacity to track terminated Vartec calls as intrastate or interstate; BellSouth did not have that capacity at the relevant times but instead relied on Vartec's self-reporting.

BellSouth filed a complaint with the Florida Public Service Commission seeking monetary relief for past underpayments. The complaint does not seek prospective relief. Vartec removed the proceeding to this court, invoking the court's removal jurisdiction under 28 U.S.C. § 1441, and asserting both diversity of citizenship and federal question jurisdiction. BellSouth has moved to remand.

Analysis

It is undisputed that BellSouth is a citizen of Georgia, Vartec is a citizen of Texas, and the amount in controversy exceeds $75,000. Had BellSouth sought resolution of this same dispute by filing a civil action in a Florida circuit court, removal to this court clearly would have been proper. But the proceeding

Exhibit C

was not filed in a Florida circuit court; it was instead filed in an administrative agency, the Florida Public Service Commission.

The issue of removal of an administrative proceeding is one of first impression in this circuit. The decisions from other circuits are split, apparently reflecting differences in the types of proceedings and administrative agencies at issue, rather than in the courts' approach to removal. *Compare* Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259 (3d Cir.1994) (disallowing removal from Pennsylvania Board of ***1282** Vehicles of complaint challenging franchise termination under state law), *and* Walthill v. Iowa Electric Light & Power Co., 228 F.2d 647, 653 (8th Cir.1956) (disallowing removal of condemnation proceeding before tribunal that was "in reality just another board of appraisers"), *with* Floeter v. C.W. Transport, Inc., 597 F.2d 1100 (7th Cir.1979) (allowing removal from Wisconsin Employment Relations Commission of labor complaint that was governed exclusively by federal law), *and* Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board, 454 F.2d 38 (1st Cir.1972) (allowing removal from Puerto Rico Labor Relations Board of labor complaint governed exclusively by federal law). Of these decisions, Sun Buick is the closest to the case at bar; I follow its reasoning and result, with the following additional analysis. [FN1]

> FN1. *Floeter* and *Volkswagen* arose in a specific context-- federal labor law--in which the federal interest is paramount; indeed, as a matter of substantive law, Congress has preempted the field. Those decisions cast little light on the issue in the case at bar and suggest not at all that those courts would approve removal here.

The sole basis for removal jurisdiction invoked by Vartec (or at issue in the cases cited above) is 28 U.S.C. § 1441, which provides in relevant part:

> Except as otherwise expressly provided by Act of Congress, *any civil action* brought in a *State court* of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (emphasis added). The issue is whether the proceeding BellSouth initiated in the Florida Public Service Commission was a "civil action" brought in a "State court" within the meaning of the statute.

Vartec asserts, and the Seventh and First Circuits held in the *Floeter* and *Volkswagen* decisions cited above, that this determination turns on matters of substance, not form or nomenclature. For purposes of this order, I assume this is correct. Thus I assume, as Vartec asserts, that a state tribunal that functions as a court is a "State court," even if in state usage it is called something else. A rose by any other name.

The difficulty with Vartec's attempted removal, however, is that the Florida Public Service Commission is not in substance a court. To the contrary, the Florida Public Service Commission is a quintessential administrative agency, functioning in that capacity day in and day out, making policy decisions, setting rates, implementing regulatory statutes, and otherwise doing the kinds of things that administrative agencies typically do. The Florida Public Service Commission exists precisely because there are issues (including those dealing with such things as terminating access charges) that may appropriately be addressed by an administrative agency with special expertise and regulatory authority, rather than by a court.

Vartec does not seem to deny this, nor could it. Vartec asserts, however, that the focus should not be on the Public Service Commission's usual or dominant functions in the many matters it addresses, but instead solely on how it would function in resolving the specific dispute at issue in the case at bar. I disagree for two reasons, one based on the language of the statute and the other based on the practical requirements for removal jurisprudence.

First, § 1441 imposes two separate requirements: that the proceeding at issue be a "civil action," and that the tribunal at issue be a "State court." The nature of a specific dispute bears on the question of ***1283** whether a proceeding is a "civil action" but ordinarily does not alter the status of the tribunal. A reading of § 1441 that allowed removal of every proceeding of an adjudicatory nature--that is, every "civil action"--without imposing a separate requirement that the tribunal also be a "State court" would render the statute's reference to a "State court" wholly superfluous, contrary to the usual rules of statutory construction. *See* Sun Buick, Inc. v. Saab

Cars USA, Inc., 26 F.3d 1259, 1267 (3d Cir.1994) (holding removal improper even if state tribunal "was acting in an adjudicatory manner rather than in an administrative one"; assertion that acting in adjudicatory manner is sufficient to allow removal "inappropriately conflates two requirements of removal statute," that there be both a "civil action" and that it be "brought in a State court").

Second, there are substantial practical reasons why the state tribunal's status should be determined at a higher level of generality than its role in the specific proceeding at issue. To the extent possible, removability should be governed by clear rules, so that improper removals (with their attendant delay and interference in state proceedings) may be minimized. An approach that made removability turn on a federal court's after-the-fact, case-by-case analysis of whether an administrative agency would be acting in the same manner as a court in resolving a particular dispute would have the capacity to create substantial mischief in the administrative arena, by encouraging parties to take a shot at removal, with inevitable delays and disruptions. Given the number and variety of administrative proceedings that take place in this state on a daily basis--many involving out-of-state respondents--this is a matter of no small moment. [FN2]

> FN2. Many such proceedings involve a governmental entity, not merely private parties. The State of Florida is not a citizen of any state for diversity purposes; administrative proceedings initiated by the state and not arising under federal law would create no issue of removability. But cities and many other governmental entities *are* citizens of the state for diversity purposes. If the proceeding at issue here were held removable based on a case-specific analysis of the nature of the function the agency would perform to resolve the matter, then the number of other administrative proceedings that also would be rendered removable--or at least would create an arguable issue sufficient to allow removal and require a case-specific determination of a motion to remand--would be significant.

I thus conclude that the issue is not just how the Florida Public Service Commission would act in resolving this particular dispute, but rather how it functions generally. Day in and day out, the Commission functions as an administrative agency, not as a court.

This analysis does not mean that, for purposes of § 1441, every entity necessarily has only a single status--for example, as an administrative agency or court--once and for all. To the contrary, a state could create an entity with dual capacities, as a regulator and also as a court. But the Florida Public Service Commission is not such a dual entity; it is, instead, a single entity with a single regulatory raison d'etre. It happens that, in fulfilling its regulatory function, the Commission sometimes resolves disputes between carriers, but when it does so, it functions as, and remains for purposes of § 1441, an administrative agency, not a court.

Indeed, the Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. § 364.07 (2001), not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in a different court; instead, it afforded a remedy in a different type of ***1284** forum altogether. In such a proceeding, the competence brought to bear will not be that of a court, but of a regulator. When BellSouth opted to bring its claim against Vartec to the Commission, it elected an administrative remedy before a regulatory body, not a civil action in a court. [FN3]

> FN3. BellSouth's invocation of the administrative remedy may or may not create other issues: whether under Florida law the administrative remedy is available under these circumstances, whether the remedy is exclusive, whether Vartec can seek judicial relief, and if so, when and how. None of those are issues now before the court. The case now pending in this court is not an action seeking to enjoin the administrative proceeding, nor is it a separate action seeking declaratory or other relief in connection with the underlying dispute. All that is pending here is the administrative complaint as filed in the Public Service Commission and removed

(albeit improperly) to this court.

It is true, as Vartec notes and BellSouth concedes, that procedures before the Commission are in some respects similar to those available in courts. Thus the parties may take discovery and present and cross-examine witnesses. But in many respects,the applicable procedures also are different, most notably with respect to the expertise of the decision makers. The commissioners are not trained as judges and need not even be attorneys; they are, instead, experts in the field of telecommunications (and public utilities) and the proper regulation thereof. The Florida Legislature chose to provide a methodology for resolution of inter-carrier disputes before decision makers with that expertise. It would be a bold and bizarre reading of the removal statute that attributed to Congress an intent to foreclose a state from implementing such an administrative remedy whenever federal jurisdiction would exist over a civil action raising the same claim in court.

There are other differences between court procedures and the procedures in effect at the Public Service Commission as well. Courts enter enforceable judgments; the Public Service Commission, in contrast, ordinarily must go to court to enforce its orders. *See, e.g.,* § 364.015, Fla. Stat. (2001). At least in some proceedings, direct testimony is presented before the Commission in writing, not live, with only a summary presented orally. Hearsay evidence ordinarily is admissible, although generally it cannot alone sustain a finding. *See* § 120.57(c), Fla. Stat. (2001); Fla. Admin. Code r.28- 106.213(3) (2001). Other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs also may be admissible, whether or not such evidence would be admissible in court. § 120.569(2)(g), Fla. Stat. (2001). And at least in some proceedings, the Commission staff has a role having no counterpart in a court.

That Florida Public Service Commission procedures resemble court procedures in some respects but not others merely illustrates that administrative proceedings generally are the same in some respects, and different in others, from court proceedings. But only court proceedings are removable.

Finally, Vartec also apparently asserts that this dispute could not properly have been resolved in the Florida Public Service Commission at all, because "there is no statute that authorizes the FPSC to hear actions to collect charges from a customer, which are normally filed in court." (Vartec's Response in Opposition to BellSouth's Motion To Remand, document 23, at 11.) BellSouth disagrees, citing § 364.07, Fla. Stat. (2001), which explicitly gives the Florida Public Service Commission jurisdiction to resolve at least some disputes between carriers. [FN4] I need not resolve this ***1285** issue of the Commission's authority under Florida law, because even if Vartec were correct, this would not support removal. The remedy for a state administrative agency's improper exercise of state-law-created jurisdiction over state-law disputes is not removal to federal court. [FN5]

FN4. Vartec's contention draws some support from the Eleventh Circuit's decision in *Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Svs., Inc.*, 278 F.3d 1223 (11th Cir.2002), which addressed the issue of the *Georgia* Public Service Commission's lack of authority under federal or *Georgia* state law to resolve a dispute between two carriers arising under an interconnection agreement. Georgia apparently has no counterpart to § 364.07, Fla. Stat. (2001).

FN5. *Cf. Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (holding that the Eleventh Amendment bars any claim for injunctive relief against a state or state entity based on state law).

The bottom line is this. Under Florida law, this may or may not be a proceeding that properly can be adjudicated by the Florida Public Service Commission. This jurisdictional issue may be addressed in the Florida Public Service Commission and presumably will be susceptible to judicial review at an appropriate time in an appropriate court, by appeal or otherwise. But whatever jurisdiction and authority exist in the Florida Public Service Commission, they are administrative in nature. The Florida Public Service Commission is not a "court." Removal under § 1441 was improper. *See Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d

Cir.1994).

For these reasons,

IT IS ORDERED:

The motion of BellSouth Telecommunications, Inc. to remand (document 15) is GRANTED. This proceeding is remanded to the Florida Public Service Commission. The clerk shall take all action necessary to effect the remand.

SO ORDERED this 14th day of February, 2002.

END OF DOCUMENT

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of BellSouth Telecommunications, Inc., Complainant	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
v.	)	AND GRANTING MOTION
	)	FOR PROCEDURAL ORDER
Thrifty Call, Inc., Respondent	)	

BY THE PRESIDING COMMISSIONER: On June 23, 2000, the Commission issued an Order denying Thrifty Call, Inc's (TCI's) Motion to Dismiss, or, in the Alternative, to Stay BellSouth Telecommunications, Inc. (BellSouth's) Complaint filed May 11, 2000. The Commission also scheduled a hearing on this matter beginning on September 19, 2000, with BellSouth to prefile testimony by August 18, 2000, and TCI to prefile testimony by September 1, 2000. On July 12, 2000, BellSouth filed a First Set of Data Requests with TCI, requesting response by August 11, 2000.

TCI Motion for Reconsideration

On August 1, 2000, TCI filed a Motion for Reconsideration and Request for Stay of Discovery. According to TCI the Commission's conclusion that the audit provision was permissive and not mandatory was in error; and the "natural and proper interpretation of the provision at issue permits BellSouth to conduct an audit or not, at its discretion, but it must conduct an audit prior to embroiling the Commission in a dispute between the parties." (Emphasis in original). The tariff describes an audit as the sole method of PIU revision and does not provide for other remedies or procedures. This conclusion is compelled by contract and tariff law principle and is prudent public policy. Even should the Commission conclude that BellSouth is not compelled by the terms of its tariff to conduct an audit, it should nevertheless reconsider its Order and dismiss BellSouth's Complaint because the only relief which BellSouth seeks is either moot or beyond the Commission's jurisdiction. The proper remedy for PIU errors is to revise the PIU prospectively from the date of completion of the audit and backwards one quarter. Such remedy will be pointless because TCI has ceased all operations, sold its assets, and terminated all its BellSouth feature groups. TCI has also moved to cancel its certificate.

The operative provision of BellSouth's access tariff, Section E2,3,14B(1) states that "when a billing dispute arise...[BellSouth] may, by written request, require the IC [or End

Exhibit D

User] to provide the data the IC used to determine the projected percentage. This written request will be considered the initiation of the audit." (Emphasis added). According to TCI, the use of the word "may" in this section means that BellSouth is not required to seek and audit when it dispute the PIU factor of one of its customer; but this does not empower BellSouth to do anything else it chooses instead of an audit. In the event of a billing dispute, BellSouth reserves the right to take steps as serious as ordering an independent audit but will more typically resort to less severe actions, such as negotiation. Any other interpretation makes the tariff binding on customers, but not on BellSouth. This is contrary to the "filed tariff" doctrine requiring common carriers to adhere to their own tariffs.

The above quoted section must also be read in pari materia with other provisions in BellSouth's tariff which make clear that BellSouth's sole, initial remedy is to request an audit. For example, Section E2,3,14(4) provides that "[i]f a billing dispute arise...[BellSouth] will ask the IC [or End User] to provide the data the IC uses to determine the projected interstate percentage. The IC shall supply the data to an independent auditor within thirty days of [BellSouth's] request." TCI's interpretation is consistent with the intent of the audit provisions meant to facilitate cooperative dispute resolution. For example, Section E2.4.1G of the access tariff titled "Payment of Rates, Charges, and Deposits" states: "The Company and the IC shall work cooperatively to resolve the dispute. If additional information of the IC would assist in resolving the dispute, the IC may be requested to provide additional information relevant to the dispute and reasonably available to the customer."

Ironically, BellSouth's own complaint asked the Commission to order TCI immediately to comply with BellSouth's request for an audit of past PIU reporting and minutes of use sufficient to enable BellSouth to calculate its damages.

Lastly, TCI urged that BellSouth's discovery requests be stayed until after the Commission rules on TCI's Motion for Reconsideration and determines whether to dismiss BellSouth's Complaint.

BellSouth Motion for Procedural Order

On August 1, 2000, BellSouth filed a Motion for Entry of Procedural Order. BellSouth stated that, as the schedule currently stands, there is insufficient time for BellSouth to conduct discovery prior to the date on which its prefiled direct testimony is due. TCI's responses are due on August 11, 2000, which is only one week before BellSouth's prefiled testimony is due. Therefore, BellSouth requested an expedited discovery schedule and a revision of the hearing and prefiled testimony schedule as follows: Prefiled direct testimony on October 20, 2000; prefiled rebuttal testimony on November 3, 2000; and the hearing on or after November 3, 2000.

BellSouth Response to Motion for Reconsideration and Stay

On August 8, 2000, BellSouth filed its Response to Motion for Reconsideration and Request for Stay of Discovery. BellSouth set out three lines of argument.

First, BellSouth argued that the Commission had held correctly that it is not obligated to conduct an audit prior to seeking Commission relief. Section E2.3.14B sets forth the availability of the PIU audit--which the Commission found to be (and TCI admitted was) permissive. Nothing in the tariff bars BellSouth from seeking relief from the Commission to enforce the tariff without conducting an audit. The inclusion of a permissive audit provision does not obligate BellSouth to conduct an audit before, for instance, negotiations can take place. TCI, of course, argued that other provisions in the tariff come into play, but these additional tariff provisions to which TCI cited are inapposite. Section E2.3.14D(4) provides the means by which the new PIU should be applied--if an audit is conducted. Thus, in situations in which BellSouth chooses not to conduct an audit, this section does not apply; nor does it act in any way to modify the permissive nature of Section E2.3.14B(1). TCI also cited to Section E.2.4.1G. This section is even more tangential, inasmuch as BellSouth has attempted to work cooperatively with TCI to resolve this dispute prior to seeking Commission intervention. However, TCI has consistently refused to provide information substantiating its PIU. BellSouth's complaint is not premature since BellSouth has, among other points, investigated it to the extent that it is able and has developed proof independently.

Second, BellSouth argued that the Commission should not dismiss its Complaint on the grounds that the relief sought is allegedly moot. Indeed, the Commission should not even consider this argument because it is a brand new argument and is untimely. Even so, TCI's arguments are without merit. Section E2.3.14.D(1), upon which TCI relies, only applies to an adjustment to the PIU based upon the audit results. If there is not audit, then this section does not apply. BellSouth is seeking enforcement of its tariff and is entitled to back payments.

Third, BellSouth argued that the Commission should deny TCI's Motion to Stay Discovery. BellSouth noted the uncooperative tone of TCI's filing where it characterized all of the interrogatories and requests for production as overbroad. Since there are no grounds for the Commission to reconsider its June 23, 2000, Order, there are similarly no grounds to stay discovery.

TCI's Opposition to Motion for Procedural Order

On August 9, 2000, TCI filed its Opposition to BellSouth's Motion for a Procedural Order. First, TCI noted that the Commission had a Motion for Reconsideration pending before the Commission. In the event the Commission does not grant TCI's Motion, TCI continues to oppose BellSouth's request to postpone the established deadlines. Lastly,

should the Commission conclude that BellSouth's Motion should be granted, TCI requested that the Commission provide for non-simultaneous filing of direct and rebuttal testimony.

Whereupon, the Presiding Commissioner reaches the following

CONCLUSIONS

After careful consideration the Presiding Commissioner concludes that TCI's Motion for Reconsideration should be denied for the reasons as generally set forth by BellSouth. The Presiding Commissioner also finds good cause to grant BellSouth's Motion for Procedural Order, subject, however, to the provisions set out below:

1. That the hearing now scheduled for September 19, 2000, be rescheduled to begin on Monday, December 4, 2000, at 1:30 pm, in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh North Carolina.

2. That the parties prefile according to the following schedule:

   a. BellSouth shall prefile its direct testimony on October 20, 2000.

   b. TCI shall prefile its direct testimony on November 3, 2000.

   c. BellSouth Shall prefile its rebuttal testimony on November 10, 2000.

3. That discovery be regulated as follows:

   a. With respect to the discovery which BellSouth filed on July 12, 2000, and BellSouth requested to be due on August 11, 2000, TCI shall have until August 18, 2000, to serve responses and/or file objections on an item-by-item basis. BellSouth has five calendar days to respond to objections.

   b. No additional discovery, including depositions, may be conducted after September 30, 2000.

   c With respect to further data requests, the following procedures shall be followed:

      (1) Parties shall file data requests with the Commission. The filing party shall fax copies of these data requests to the receiving party at the same time the data requests are filed with the Commission;

(2) After a data request is filed with the Commission and served on a party via fax, the party receiving the data request shall have seven calendar days to file objections to it on an item-by-item basis. The party objecting to discovery shall fax copies of the objections to the party seeking discovery contemporaneously with such filing.

(3) If the party seeking discovery intends to pursue requests objected to, it must file responses to the objections on an item-by-item basis within five calendar days after the time the responding party files its objections. The party seeking discovery shall fax copies of its responses to the party objecting to the data request contemporaneously with such filing.

(4) Parties receiving data requests shall serve answers to data requests to which they have not objected on the party seeking the discovery within 14 calendar days of the filing of such data requests.

(5) If the Commission orders a party to answer data requests to which it has objected, the party shall have seven calendar days from the date of the Commission Order requiring disclosure to serve answers to such data requests.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 11th day of August, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

rp081000.10

Edward L. Rankin, III
General Counsel - North Carolina

BellSouth Telecommunications, Inc.
1521 BellSouth Plaza
P. O. Box 30188
Charlotte, North Carolina 28230
Telephone: 704-417-8833
Facsimile: 704-417-9389

August 8, 2000

Ms. Geneva S. Thigpen
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Re: Docket No. P-447, Sub 5

Dear Ms. Thigpen:

I enclose for filing in the above-referenced docket the original and thirty-one copies of BellSouth Telecommunications, Inc.'s Response to Motion for Reconsideration and Request for Stay of Discovery. I also enclose an extra copy of this letter, which I would appreciate your stamping "Filed" and returning to me in the usual manner.

Thank you for your assistance in this matter.

Sincerely,

Edward L. Rankin, III

Edward L. Rankin, III

ELR/db
Enclosures
cc Marcus W. Trathen, Esq.

Exhibit E

BEFORE THE

NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

BellSouth Telecommunications, Inc., Complainant,	)	
v.	)	Docket No. P-447, Sub 5
Thrifty Call, Inc. Respondent.	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO MOTION FOR RECONSIDERATION AND REQUEST FOR STAY OF DISCOVERY

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds and objects to Thrifty Call, Inc.'s ("Thrifty Call") Motion for Reconsideration and Request for Stay of Discovery. Thrifty Call has presented no grounds for the Commission to reconsider its decision to deny Thrifty Call's Motion to Dismiss and therefore the Commission should deny the Motion for Reconsideration. In addition, Thrifty Call has presented no grounds that necessitate a stay of discovery in this proceeding.

DISCUSSION

A. The Commission Correctly Held That BellSouth Is Not Obligated To Conduct An Audit Prior To Seeking Commission Relief.

In its Motion for Reconsideration, Thrifty Call states that it "agrees" with the Commission's finding that the tariff does not mandate that BellSouth conduct an audit. (Motion, p. 1.) In an apparent contradiction, however, Thrifty Call argues that while the audit may not be mandatory, BellSouth *is* obligated to conduct an audit prior to seeking relief from this

Commission. (Motion, p. 2.) As the Commission recognized in its June 23 Order, there is no support in the tariff for Thrifty Call's position. Moreover, Thrifty Call has not presented this Commission with any new arguments that should cause the Commission to reconsider its June 23 Order.

Section E2.3.14B sets forth the availability of the PIU audit. As the Commission correctly concluded, the tariff provides that BellSouth "*may*, by written request, require the IC to provide the data the IC used to determine the projected interstate percentage" for purposes of an audit. *See* E2.3.14B (emphasis added). The language of the tariff, as Thrifty Call apparently agrees, is permissive; in other words, there is nothing that mandates that BellSouth conduct an audit.

Moreover, there is nothing in the tariff that bars BellSouth from seeking relief from the Commission to enforce the tariff without conducting an audit. As Thrifty Call pointed out in its filing, the tariff is the equivalent of a contract between BellSouth and Thrifty Call. BellSouth, like any other carrier, has the right to seek enforcement of its "contract" from the Commission. There is nothing in Section E2.3.14 of the tariff that obligates BellSouth to conduct an audit prior to seeking such enforcement from the Commission; in fact, the only relevant language in the tariff (set forth in E2.3.14B) explicitly provides that the audit provision is permissive and discretionary. In the absence of explicit language, the tariff should not be read to constitute a waiver of BellSouth's right to a Commission proceeding to enforce the terms of the tariff.

Under Thrifty Call's view of the world, because BellSouth included a discretionary clause permitting an audit in the tariff, BellSouth then has an affirmative duty to specifically set forth every other remedy to which it could avail itself to preserve those remedies. Even Thrifty Call, however, cannot consistently maintain this position. On page 5 of the Motion, for example,

Thrifty Call states that BellSouth could resolve its PIU dispute with Thrifty Call through resort to "less severe options such as negotiations." Obviously, this option is not explicitly set forth in the tariff, but it is still available to BellSouth; the inclusion of a permissive audit provision does not obligate BellSouth to conduct an audit before negotiations can take place.

The only language Thrifty Call points to in support of its argument demonstrates the weakness of Thrifty Call's position. Specifically, Thrifty Call cites to E2.3.14D(4) which provides the means by which the new PIU should be applied *if an audit is conducted.* In situations in which BellSouth chooses not to conduct an audit (as Thrifty Call admits BellSouth has the discretion to do), Section E2.3.14D(4) does not apply. It certainly does not modify the permissive nature of Section E2.3.14B(1) which, as the Commission found, explicitly states that BellSouth "may" conduct an audit. Section E2.3.14D(4) has no relevance until such time as BellSouth chooses to undertake an audit; it has no bearing on *whether* BellSouth conducts such an audit.

Thrifty Call also contends that Section E2.4.1G, which provides for cooperation between the parties, supports our position. This citation is more tangential than Thrifty Call's reference to E2.3.14D(4). First, even though factual questions are not relevant to a motion to dismiss, there is no doubt, as the parties' correspondence indicates, that BellSouth attempted to work cooperatively with Thrifty Call as specified in E2.4.1G to resolve this dispute prior to seeking Commission intervention. However, despite BellSouth's efforts, Thrifty Call consistently refused to provide information substantiating its PIU.[1] Such recalcitrance has left BellSouth with no choice than to seek Commission involvement to reach resolution of this dispute. Second, the

[1] It also appears from Thrifty Call's cryptic references to "overbroad requests" in Thrifty Call's Motion to Stay Discovery that Thrifty Call is going to continue to object to providing any information to support its PIU even in discovery.

fact that the parties agree to work cooperatively in no way limits or restricts the remedies available to BellSouth if cooperative efforts prove unsuccessful. When, as in this case, cooperative efforts break down, BellSouth is entitled to seek relief from the Commission.

Apparently recognizing the lack of credibility in its legal arguments based on the tariff, Thrifty Call repeats the rhetoric of its Motion to Dismiss and claims that the Commission's ruling will "encourage BellSouth to disregard the obligations of its tariffs." This allegation, of course, is based on the premise that BellSouth has somehow violated its tariff which the Commission already concluded is not the case. As the Commission correctly ruled, the audit provision of the tariff is permissive, and in no way limits BellSouth's right to seek enforcement of the tariff from the Commission.

Finally, Thrifty Call reiterates its argument that BellSouth's Complaint is premature because BellSouth has yet to fully investigate its claim. This allegation lacks merit for three reasons. First, Thrifty Call already made this argument to the Commission in its Motion to Dismiss and the Commission chose not to accept it. Simply repeating the argument is not appropriate grounds to file a motion for reconsideration. Second, for purposes of a motion to dismiss, the Commission must construe the facts alleged in the Complaint in favor of BellSouth. Thus, Thrifty Call's criticism of the sufficiency of BellSouth's evidence is irrelevant for purposes of this motion. Third, as BellSouth explained in response to the motion to dismiss, BellSouth did not need an audit to file its Complaint because it conducted its own investigation, including test calls, that verified its claim.

The Commission correctly held in its June 23 Order that the audit provision in BellSouth's tariff is permissive and in no way bars BellSouth from seeking relief from this

Commission to enforce the terms of its tariff. Thrifty Call has not presented any grounds upon which the Commission should reconsider that decision, and thus BellSouth respectfully requests that the Commission deny Thrifty Call's Motion.

B. The Commission Should Not Dismiss BellSouth's Complaint On The Grounds That The Relief Sought Is Allegedly Moot.

Thrifty Call next alleges that the Commission should reconsider its Order because "the relief BellSouth seeks is either moot or beyond the Commission's jurisdiction." (Motion, p. 2.) Like Thrifty Call's argument regarding the audit, this argument provides no grounds upon which the Commission should reconsider its June 23 Order. First, and most importantly, the Commission should not even consider this argument because it was not set forth in Thrifty Call's original motion to dismiss and thus is untimely. At this stage of the proceeding, it is not appropriate for Thrifty Call to put forth brand new arguments – such arguments, to the extent Thrifty call considered them meritorious, should have been raised in Thrifty Call's original motion. This argument is now barred and should be disregarded by the Commission.

Even if the Commission chooses to consider this argument, it should reject it. Section E2.3.14D(1), upon which Thrifty Call relies, only applies to an adjustment to the PIU "based upon the audit results." Obviously, if no audit is conducted, this section does not come into play. Section E2.3.14D(1), therefore, does not constrain BellSouth in the relief it can seek, and the Commission can award whatever relief it believes appropriate. This is especially true in situations such as this one in which the basis for the complaint is fraudulent and intentional misrepresentation of the PIU figure by Thrifty Call.

Thrifty Call also alleges that the Commission should dismiss the Complaint on the grounds that the relief sought is moot. This argument also is without merit. What BellSouth seeks from this Commission is enforcement of its tariff. The relief sought by BellSouth is

analogous to CLPs seeking enforcement of the reciprocal compensation provisions of interconnection agreements for ISP traffic. As with ISP traffic, if the Commission believes that the enforcement of the tariff entitled BellSouth to back payments, the Commission has taken the position that it has the authority to award such back payments.

Moreover, the fact that Thrifty Call purports to no longer do business in North Carolina is not grounds to dismiss the complaint. Thrifty Call still has its certificate and thus could do business in North Carolina. Moreover, just because Thrifty Call allegedly has stopped doing business in North Carolina is no grounds to relieve Thrifty Call from financial responsibility for past fraudulent violations of tariff by intentional misrepresentation of its PIU.

C. **The Commission Should Deny Thrifty Call's Motion to Stay Discovery.**

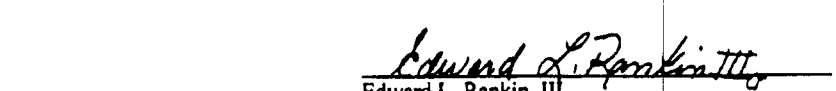
Thrifty Call also asked the Commission to stay the discovery period pending consideration of the motion for reconsideration. Given that there are no grounds for the Commission to reconsider its June 23 Order, there are no grounds to stay discovery. In fact, Thrifty Call's Motion to Stay supports the need for the expanded discovery period set forth in BellSouth's Motion for Procedural Order filed with the Commission on August 1, 2000. In its Motion to Stay, Thrifty Call states that BellSouth's discovery requests "seek responses to 27 Interrogatories and 15 Requests for Production, *all of (over) broad scope*." (emphasis added) BellSouth disagrees that its discovery requests are overbroad, and considers Thrifty Call's characterization of the requests as such as further evidence of Thrifty Call's refusal to produce evidence relevant to support Thrifty Call's alleged PIU. Given Thrifty Call's indication that it will object to BellSouth's discovery requests, it seems likely that BellSouth will need a discovery period sufficient to seek Commission involvement.

CONCLUSION

For the reasons set forth herein, BellSouth respectfully requests that the Commission deny Thrifty Call's Motion for Reconsideration and Request for Stay of Discovery.

Respectfully submitted, this 8th day of August, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



Edward L. Rankin, III
1521 BellSouth Plaza
300 South Brevard Street
Charlotte, North Carolina 28202
(704) 417-8833

R. Douglas Lackey
Lisa S. Foshee
T. Michael Twomey
675 West Peachtree Street, Suite 4300
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel for Thrifty Call by placing a copy of same in the U.S. mail, first class postage prepaid, this 8th day of August, 2000.

Dorothy Barker

223578

NORTH CAROLINA UTILITIES COMMISSION

NOTICE TO PARTIES

Docket No. P-447, Sub 5 Exceptions Due on or Before 4-26-01

Parties to the above proceeding may file exceptions to the report and Recommended Order hereto attached on or before the day above shown as provided in G.S. 62-78. Exceptions, if any, must be filed (original and thirty (30) copies) with the North Carolina Utilities Commission, Raleigh, North Carolina, and a copy thereof mailed or delivered to each party of record, or to the attorney for such party, as shown by appearances noted. Each exception must be numbered and clearly and specifically stated in one paragraph without argument. The grounds for each exception must be stated in one or more paragraphs, immediately following the statement of the exception, and may include any argument, explanation, or citations the party filing same desires to make. In the event exceptions are filed, as herein provided, a time will be fixed for oral argument before the Commission upon the exceptions so filed, and due notice given to all parties of the time so fixed; provided, oral argument will be deemed waived unless written request is made therefor at the time exceptions are filed. If exceptions are not filed, as herein provided, the attached report and recommended decision will become effective and final on 4-27-01 unless the Commission, upon its own initiative, with notice to parties of record modifies or changes said Order or decision or postpones the effective date thereof.

The report and Recommended Order attached shall be construed as tentative only until the same becomes final in the manner hereinabove set out.

Exhibit F

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of BellSouth Telecommunications, Inc.,	)	
Complainant,	)	
v.	)	RECOMMENDED ORDER RULING ON COMPLAINT
Thrifty Call, Inc.,	)	
Respondent.	)	

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on December 5, 2000, at 9:00 a.m.

BEFORE: Commissioner Sam J. Ervin, IV
Commissioner William R. Pittman
Commissioner J. Richard Conder

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Andrew D. Shore, BellSouth Telecommunications, Inc., 1521 BellSouth Plaza, Post Office Box 30188, Charlotte, North Carolina 28230

Michael Twomey, BellSouth Telecommunications, Inc., Legal Department, Suite 1870, 365 Canal Street, New Orleans, Louisiana 70130-1102

FOR THRIFTY CALL, INC.:

Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, Post Office Box 1800, Raleigh, North Carolina 27602

Danny E. Adams, Kelley Drye and Warren, L.L.P., 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036

BY THE COMMISSION: BellSouth Telecommunications, Inc., (BellSouth) initiated this proceeding on May 11, 2000, by filing a Complaint against Thrifty Call, Inc., (Thrifty Call). BellSouth alleged that Thrifty Call had misreported PIU factors to BellSouth under its tariffs, by intentionally overstating its percent interstate usage. On May 15, the Commission ordered that BellSouth's Complaint be served upon Thrifty Call.

On June 5, 2000, Thrifty Call responded to BellSouth's Complaint by filing a Motion to Dismiss or, in the Alternative, to Stay. Based on the language of BellSouth's own tariff, Thrifty Call argued that the Commission should dismiss or at least stay BellSouth's Complaint, given that BellSouth had requested relief that it was beyond the powers of the Commission to grant. On June 7, 2000, the Commission ordered that Thrifty Call's response be served upon BellSouth.

On June 21, 2000, BellSouth filed a reply in opposition to Thrifty Call's Motion to Dismiss or Stay.

On June 23, 2000, the Commission issued an Order Denying Motion and Setting Hearing, which denied Thrifty Call's request for dismissal or a stay, set this matter for hearing at 9:30 a.m. September 19, 2000, and established a schedule for the submission of prefiled testimony.

On July 12, 2000, BellSouth served its first set of data requests upon Thrifty Call, consisting of both interrogatories and requests for production of documents.

On August 1, 2000, Thrifty Call filed a Motion for Reconsideration of the Commission's Order Denying Motion and Setting Hearing, reiterating its arguments that the language of the tariff in question compelled the conclusion that the Complaint should be dismissed and further pointing out that the relief requested by BellSouth was either moot or beyond the Commission's jurisdiction to grant.

On the same date, BellSouth filed a Motion for Entry of Procedural Order, in which BellSouth requested that the Commission establish a discovery schedule and postpone the hearing in order to provide adequate time for the completion of discovery.

On August 8, 2000, BellSouth filed a Response to Motion for Reconsideration and Request for Stay of Discovery and asked that the Commission deny Thrifty Call's Motion.

On August 11, 2000, the Commission issued an Order Denying Motion for Reconsideration and Granting Motion for Procedural Order that denied Thrifty Call's Motion for Reconsideration. The Order also established procedures for the conduct of discovery, rescheduled the hearing in this matter for 1:30 p.m. on December 4, 2000, and established a new schedule for the submission of prefiled testimony.

On August 18, 2000, Thrifty Call filed objections to BellSouth's data requests. On September 6, 2000, the Commission issued an order overruling all objections, save for one.

On September 13, 2000, Thrifty Call filed a Motion for Temporary Stay with the Commission seeking an order temporarily staying Thrifty Call's obligation to respond to BellSouth's data requests pending application for Writ of Certiorari to the North Carolina Court of Appeals.

On September 14, 2000, Thrifty Call filed a Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals, seeking interlocutory review of the Commission's failure to dismiss BellSouth's Complaint. On September 14, the Court of Appeals issued an order temporarily staying the proceedings before the Commission. On September 29, 2000, BellSouth filed a Response in Opposition to Thrifty Call's Petition for Writ of Certiorari and Petition for Writ of Supersedeas. On October 4, 2000, the Court of Appeals issued an order denying Thrifty Call's Petition for Writ of Certiorari and Petition for Writ of Supersedeas.

After the exchange of discovery, on October 20, 2000, BellSouth filed the testimony and exhibits of Mike Harper, and the testimony of Jerry Hendrix.

On November 3, 2000, Thrifty Call filed the testimony and exhibits of Harold Lovelady.

On November 8, 2000, BellSouth requested that the Commission reschedule the hearing in this matter for 9:00 a.m. on December 5, 2000.

On November 13, 2000, BellSouth filed the rebuttal testimony of Mike Harper.

On that same date, the Commission issued an Order rescheduling the hearing in this matter for 9:00 a.m. on December 5, 2000.

At the evidentiary hearing, which began as scheduled on December 5, 2000, BellSouth offered the testimony of Mike Harper and Jerry Hendrix. Thrifty Call offered the testimony of Harold Lovelady.

FINDING OF FACT

1. Thrifty Call misreported Terminating Percent Interstate Usage to BellSouth in the period from 1998 to 2000 and should pay BellSouth $1,898,685.00 representing the amount in intrastate switched access charges Thrifty Call should have paid for that period.

2. BellSouth was not required to conduct an audit of Thrifty Call prior to filing a complaint for relief.

3. Additional arguments raised by Thrifty Call are without merit.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This case involves the calculation and reporting of Terminating Percent Interstate Usage (TPIU) factors with respect to certain Feature Group D (FGD) traffic. BellSouth contends that Thrifty Call has misreported 98% of its terminating traffic as interstate when in fact 90% was intrastate. The practical importance of this relates to the payment of access charges. Since access charges for interstate traffic tend to be lower than those for intrastate traffic, a higher TPIU means the payment of less access charges. BellSouth seeks payment from Thrifty Call in the amount of $1,898,685, representing the amount of intrastate switched access charges it maintains that Thrifty Call should have paid in the period 1996 to 2000.

Thrifty Call is an interexchange carrier (IXC) whose network operated in relevant part as follows: Thrifty Call would receive traffic originating in North Carolina from another IXC, usually MCI WorldCom. That traffic would be `` to Thrifty Call's switch in Atlanta, Georgia. Thrifty Call would route the traffic over its own network back to North Carolina for delivery to BellSouth and, ultimately, to end-users. Thus, it is apparent and, indeed, uncontested that the traffic both originated and terminated in North Carolina. Thrifty Call witness Lovelady admitted that at least 90 % of the calls originated and terminated in North Carolina. The call detail records reluctantly provided by Thrifty Call confirm this. How, then, could such traffic be converted from intrastate to interstate traffic?

The answer that Thrifty Call returns is that it was appropriately relying on the FCC's entry-exit surrogate (EES) methodology. BellSouth replies that this methodology was not meant to apply to FGD traffic. Rather, the appropriate standard is to be found in BellSouth's intrastate tariff, which clearly supports BellSouth's view.

The two tariffs are in pertinent part set out as follows:

1. BellSouth Telecommunications, Inc. Tariff FCC No. 1 (FCC Tariff) ¶ 2.3.10(AX1)(a)

> Pursuant to Federal Communications Commission Order FCC 85-145 adopted April 16, 1985, interstate usage is to be developed as though every call that enters a customer network at a point 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 entry is in a state other than that where the called station (as designated by the called number) is situated is an interstate communication. (emphasis added)[1]

2. BellSouth Telecommunications, Inc. Access Services Tariff (Intrastate Tariff) §E.2.3.14 (A)(2)(a)

> 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 station) is situated is an interstate communication.

A comparison of the language of the two tariffs yields substantial similarities and a few differences. Both indicate that if the two relevant points are within the state, then the call is intrastate. If the relevant points are in different states, the call is interstate. The principal difference is that the FCC tariff uses the phrase "enters a customer's network" while the intrastate tariff uses the word "originates."

This is the nub of Thrifty Call's argument. Thrifty Call argues that the calls enter its network in Atlanta and go to North Carolina. They are, therefore, ipso facto interstate calls, regardless of where they originate or terminate.

This argument, though ingenious, is also specious. The FCC Tariff language states "enters a customer network" (emphasis added), not necessarily Thrifty Call's network. The call that Thrifty Call is carrying in fact originates and terminates in North Carolina. The record is uncontroverted that, with respect to the minutes of use at issue, Thrifty Call is acting as a subcontractor for another IXC. For the purposes of properly construing this language, "enters a customer network" refers to the IXC whose customer originates the call. [2] There is one call, not two.

---

[1] According to Thrifty Call, this tariff applies to FGD traffic as well as to Feature Group A (FGA) and Feature Group B (FGB) traffic. (See, FCC Tariff ¶ 2.3.10(A)(1)(b); however, the original FCC Order 85-145 addressed FGA and FGB only).

[2] It should be recalled that the language ultimately derived from an FCC Order issued in 1985--close to telecommunications prehistory from our present perspective. The somewhat odd and "antique" use of the phrase derives from the fact that the originating IXC is a "customer" to the ILEC's access services. The preferred modern usage is "originating."

This conclusion is buttressed by further considerations. First, if Thrifty Call's interpretation were correct, it would mean open season for the "laundering" of minutes of use. An originating carrier with large amounts of intrastate traffic might be irresistibly tempted to convert such intrastate traffic into interstate traffic through the simple expedient of handing off such traffic to another IXC with a switch in a different state. Such IXCs might be irresistibly tempted to enter into financial arrangements based on the avoidance of the payment of intrastate access charges otherwise due. It is undoubtedly better to remove this temptation than to abet it.

Second, if Thrifty Call were correct, then it should have applied the same methodology in Georgia. Logically, most Georgia calls should have been intrastate. At hearing, however, Thrifty Call admitted in Georgia that it used the originating and terminating points of the calls to determine whether the call was intrastate or interstate. Thrifty Call was apparently selective in its adherence to the EES methodology.

In summary, it does not matter which tariff is used to arrive at the TPIU. The conclusion is the same. The traffic at issue is intrastate if it originates and terminates in North Carolina or if it "enters a customer network" in North Carolina and terminates in North Carolina. It does not matter whether more than one IXC is involved or where in the country the call is switched between the beginning point and the end point. It is not necessary to establish that Thrifty Call has evil intent or that it "intentionally" misreported the minutes of use to require that Thrifty Call pay what it ought to have paid to begin with. It is sufficient that the minutes of use were misreported.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

One of the long-running sub-themes of this proceeding is Thrifty Call's insistence that BellSouth was obliged by Tariff Section E2.3.14 (B)(1) to perform an audit of Thrifty Call prior to filing a complaint. Thrifty Call also wanted to limit the audit to adjusting the PIU on a going-forward basis. Thrifty Call has continued in its past-hearing filings to argue this issue.

The Commission has twice ruled against Thrifty Call on this issue--first, in its June 23, 2000, Order Serving Motion and Setting Hearing and, second, in its August 11, 2000, Order Denying Motion for Reconsideration and Granting Motion for Procedural Order--noting that the tariff provision was permissive, not mandatory. The Commission sees no reason to change its view on the matter now and reaffirms it based on the reasoning set out previously.

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 3

Additional arguments raised by Thrifty Call are also without merit.

Thrifty Call has questioned the Commission's authority to award backbilling in this proceeding because BellSouth has allegedly not supported its calculation of the $1,898,685 in "unbilled access charges" and is in any case limited by its tariffs, any deviation from which would constitute an award of damages.

On the contrary, the Commission believes that the $1,898,685 is well supported. See, e.g., Harper Direct, Tr. at 20-21. The Commission's authority to require the payment of sums that should have been paid but were not because of inappropriate classification is well-established and does not constitute an award of damages. Thrifty Call's argument that BellSouth's recovery is limited by its tariff is simply a variation of its argument rejected in Finding of Fact No. 2.

Thrifty Call has also suggested that BellSouth is barred by the doctrine of laches from the relief it requests. The Commission does not believe that BellSouth engaged in an unreasonable delay injurious or prejudicial to Thrifty Call in bringing its complaint.

IT IS, THEREFORE, ORDERED that Thrifty Call shall pay BellSouth the amount of $1,898,685, representing the amount of intrastate access charges Thrifty Call should have paid.

ISSUED BY ORDER OF THE COMMISSION.

This the 11th day of April, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

pc040401.01

Commissioner William R. Pittman resigned from the Commission on January 24, 2001, and did not participate in this decision.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of BellSouth Telecommunications, Inc. Complainant,	)	
v.	)	FINAL ORDER DENYING EXCEPTIONS AND AFFIRMING RECOMMENDED ORDER
Thrifty Call, Inc. Respondent	)	

ORAL ARGUMENT HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Monday, May 21, 2001, at 2:00 p.m.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding
Commissioner Ralph A. Hunt
Commissioner Robert V. Owens, Jr.
Commissioner Lorinzo L. Joyner

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Ed Rankin and T. Michael Twomey, BellSouth Telecommunications, Inc., 1521 BellSouth Plaza, 300 South Brevard Street, Charlotte, North Carolina 28230

FOR THRIFTY CALL, INC.:

Marcus W. Trathen and Charles Coble, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, Attorneys at Law, Post Office Box 1800, Raleigh, North Carolina 27602

BY THE COMMISSION: On April 11, 2001, Commissioner Sam J. Ervin, IV and Commissioner J. Richard Conder entered a Recommended Order Ruling on Complaint. On May 3, 2001, Thrifty Call, Inc. (Thrifty Call) filed six exceptions to the April 11, 2001,

Recommended Order and requested oral argument. An Order Scheduling Oral Argument on Exceptions was issued on May 4, 2001, and the oral argument was set for May 21, 2001. On May 18, 2001, BellSouth Telecommunications, Inc. (BellSouth) filed Responses to Thrifty Call's Exceptions. This matter came on for oral argument as scheduled. Both parties were represented by counsel.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

Based upon a careful consideration of the entire record in this proceeding, the Commission finds good cause to deny Thrifty Call's exceptions and to affirm the Recommended Order. The Commission agrees with and adopts all the finding of fact and conclusions reached by the two Commissioners who heard and decided the case and concludes that the Recommended Order is fully supported by the record.

IT IS, THEREFORE, SO ORDERED as follows:

1. That the exceptions filed by Thrifty Call with respect to the Recommended Order entered in this docket on April 11, 2001, be, and the same are hereby denied.

2. That the Recommended Order entered in this docket on April 11, 2001, be and the same is hereby affirmed and adopted as the Final Order of the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 14th day of June, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

pc061301.04

MFS Intelenet of Georgia, Inc.
v.
BellSouth Telecommunications, Inc.
Docket No. 8196-U

Georgia Public Service Commission
December 15, 1998

APPEARANCES: On behalf of MFS/WorldCom: John M. Stuckey, Attorney, Terri M. Lyndall, Attorney, Richard M. Rindler, Attorney, Alexandre B. Bouton, Attorney. On behalf of BellSouth Telecommunications, Inc.: Fred McCallum, Jr. Attorney, William J. Ellenberg II, Attorney, Bennett L. Ross, Attorney. On behalf of the Consumers' Utility Counsel: Jim Hurt, Attorney, Kennard B. Woods, Attorney. On behalf of Intermedia Communications Services, Inc.: Patrick Wiggins, Attorney. On behalf of ICG Telecom Group, Inc.: Charles V. Gerkin, Attorney. On behalf of American Communications Services, Inc.: William Rice, Attorney. On behalf of Nextlink: Charles V. Gerkin, Attorney. On behalf of Teleport Communications Atlanta: Charles Hudak, Attorney.

Before Robert B. Baker, Jr., chairman and Helen O'Leary, executive Secretary.

BY THE COMMISSION:

*1 BellSouth Telecommunications, Inc. ('BellSouth' or 'BST'), the respondent in this docket, presented this matter before the Commission by filing on June 26, 1998 a petition for review of the decision of the Hearing Officer. The Hearing Officer had ruled in favor of the complainant, MFS Intelenet of Georgia, Inc. ('MFS/WorldCom'), [FN1] concluding that BellSouth must pay reciprocal compensation to MFS/WorldCom for traffic originating on the BellSouth network and carried over the MFS/WorldCom network to the premises of information service providers, including internet service providers ('ISP traffic'). The Hearing Officer documented these rulings in his 'Initial Decision of the Hearing Officer' ('Initial Decision') issued on May 29, 1998, and incorporated herein by this reference. The Hearing Officer issued his decision pursuant to O.C.G.A. § 50-13-17(a).

In its petition for review of the Initial Decision, BellSouth disagreed with the Hearing Officer's ruling that no evidentiary hearing was required. BellSouth also disagreed with the Hearing Officer's ruling that Internet Service Provider ('ISP') traffic is local in nature, and finally, BellSouth disagreed with the Hearing Officer's ruling that the Commission has the authority to award compensatory damages.

The Commission issued an Order Granting BellSouth Telecommunications, Inc.'s Petition for Review and Setting Procedure and Schedule, on August 20, 1998. The Commission established September 9, 1998 as the date for prefiled direct testimony, and September 16, 1998 as the date for prefiled rebuttal testimony. The Commission conducted a hearing on September 23, 1998. Subsequently the parties filed briefs on October 2, 1998, and reply briefs on October 9, 1998.

Exhibit G

For the reasons discussed in this Order, the Commission upholds and affirms the Hearing Officer's Initial Decision. The Commission finds and concludes that ISP traffic is subject to the jurisdiction of this Commission. The Commission further finds and concludes that ISP traffic is local in nature; and that pursuant to the provisions of the contract between MFS/WorldCom and BellSouth, BellSouth must pay reciprocal compensation to MFS/WorldCom for ISP traffic.

I. JURISDICTION AND PROCEEDINGS

This proceeding was initiated when MFS/WorldCom filed a Complaint on October 10, 1997 against BellSouth, claiming that BST breached the Georgia Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 ('MFS-BST Agreement' or 'Agreement') dated August 30, 1996, as amended, by and between MFS Communications Company, Inc., and BST. MFS/WorldCom further alleged that BST failed to meet obligations placed on BST by the Telecommunications Act of 1996 ('Telecommunications Act'), the Telecommunications and Competition Development Act of 1995 (the 'Georgia Act '), and the Rules and Orders of the Commission.

The Commission has jurisdiction over the matter, to enforce the MFS-BST Agreement pursuant to Sections 251 and 252 of the Telecommunications Act, 47 U.S.C. Sections 251 and 252. The Commission also has jurisdiction to resolve the complaint pursuant to the Georgia Act, O.C.G.A. Sections 46-5-160 et seq., and pursuant to its general authority over companies subject to its jurisdiction.

*2 On October 28, 1997, BellSouth filed its Answer to the Complaint. Pursuant to Interim Procedures for the Hearing and Resolution of Complaints Arising from Interconnection Agreements, adopted by the Commission on November 4, 1997, this case was assigned for a hearing before a Hearing Officer. The Commission set the matter for hearing before Hearing Officer Philip Smith on Wednesday, November 25, 1997. The Parties requested and the Commission agreed to reschedule the hearing until December 19, 1997. On November 20, Intermedia Communications, Inc. petitioned to intervene. On November 24, 1997, ICG Telecom Group, Inc. petitioned to intervene. On December 4, 1997 American Communications Services, Inc. [FN2] petitioned to intervene. On December 5, 1997, Nextlink petitioned to intervene and on December 18, 1997 Teleport Communications Atlanta filed for intervention.

On December 12, 1997 BellSouth filed a Partial Motion to Dismiss based on the ground that the Commission lacks the authority to require the payment of reciprocal compensation.

On December 16, 1997 a hearing was held before Hearing Officer Philip Smith. BST presented argument in support of their Partial Motion to Dismiss Complaint. MFS/WorldCom argued the merits of the Complaint and against the BST Motion to Dismiss. At the hearing, Officer Smith granted all of the Petitions to Intervene and directed the parties to submit this matter to the Commission on briefs, on the basis that there were no material facts in dispute. The parties were directed to file briefs no later than January 9, 1998, and to file reply briefs no later than January 20, 1998.

The Initial Decision of the Hearing Officer was filed on May 29, 1998, and

BellSouth filed its Petition for Review on June 26, 1998. The Commission granted review by Order issued August 20, 1998, and set the matter for an evidentiary hearing before the full Commission. Direct testimony was prefiled on September 9, 1998, and rebuttal testimony was prefiled on September 16, 1998. The Commission took evidence at the hearing on September 23, 1998, and subsequently received the briefs and reply briefs of the parties filed on October 2 and 9, 1998.

The Commission has reviewed the Hearing Officer's Initial Decision, the transcript of the December 16, 1997 hearing, and all the pleadings including those filed before the Hearing Officer and those filed subsequently before the Commission. For the reasons stated in the Initial Decision, and those discussed herein, the Commission upholds and affirms the Hearing Officer's Initial Decision, and rules that ISP traffic is local and subject to the Commission's jurisdiction..

II. DISCUSSION OF THE ISSUES

The MFS-BST Agreement contains several provisions pertinent to the issues. Section 1.40 contains a definition of 'Local Traffic.' Section 1.58 defines Reciprocal Compensation. Sections 5.8.1 and 5.8.2 contain further provisions for reciprocal compensation. Finally, Section 36.6 contains an 'integration' or 'merger' clause which provides that the Agreement constitutes the entire agreement of the parties and supersedes all prior agreements and all contemporaneous oral arguments, negotiations, proposals, and representations concerning the subject matter. It adds that no representations, understandings, agreements, or warranties, express or implied, have been made or relied upon in the making of the Agreement other than those specifically set forth in the Agreement.

*3 The calls in dispute in this case involve calls by a BellSouth telephone exchange service end user to an MFS/WorldCom telephone exchange service end user that happens to be an information service provider, specifically an internet service provider (ISP). With respect to the calls in dispute, the telephone numbers 'bear NPA-NXX designations associated with the same local calling area of the incumbent LEC,' thus (as MFS/WorldCom asserted) meeting the definition of Local Traffic contained in Section 1.40 of the Agreement.

A. The Hearing Officer Correctly Ruled that ISP Traffic is Local in Nature, and that this Commission Has Jurisdiction over ISP Traffic.

The Commission notes that the ISP traffic calls bear NPA-NXX designations associated with the local calling area of the incumbent local exchange company (LEC), in this case BellSouth. The Commission agrees that this alone causes the calls to meet the definition of 'local traffic' contained in Section 1.40 of the MFS-BST Agreement, and therefore that reciprocal compensation is owed for the transport and termination of the calls. [FN3] The LEC terminating telecommunications traffic which meets the definition of 'local traffic' is entitled to reciprocal compensation regardless of the identity of the end user.

Many other state commissions have ruled on these issues. Among them are Arizona, [FN4] Colorado, [FN5] Connecticut [FN6] Maryland, [FN7] Michigan, [FN8] Minnesota,

[FN9] Missouri, [FN10] New York, [FN11] North Carolina, [FN12] Ohio, [FN13] Oklahoma, [FN14] Oregon, [FN15] Pennsylvania, [FN16] Tennessee, [FN17] Virginia, [FN18] Washington, [FN19] West Virginia, [FN20] and Wisconsin. [FN21] The Florida Commission also recently ruled that ISP traffic is local and subject to state commission jurisdiction, and further that BellSouth's interconnection agreements require payment of reciprocal compensation for ISP traffic. [FN22] All the state commissions that have ruled on these issues have concluded that ISP traffic should be treated no differently than other local traffic, and that it is eligible for reciprocal compensation. While these decisions are not binding upon the Commission, the Commission may take such decisions into consideration when rendering a decision.

The essential facts are that a call to an ISP is placed using a local telephone number. The LEC networks terminate this local call to the ISP, whose local exchange service numbers bear NPA-NXX designations associated with the same local calling area. [FN23] Whatever services the ISP then provides are irrelevant to the fact that the call has terminated locally. Even BellSouth's witness conceded that the telecommunications service offered by BellSouth and WorldCom to their respective end users is different from the information service offered by the ISP itself. [FN24] The Commission finds reasonable and adopts the Hearing Officer's determination in his Initial Order. The functions performed in terminating a local call to an ISP are no different from those terminating any other local call between an end user of BellSouth and an end user of MFS/WorldCom, whether residential or business. [FN25]

*4 The Commission also agrees that, as the term has been and is commonly employed in the telecommunications industry, a call placed over the public switched telecommunications network is considered to be 'terminated' when it is delivered to the telephone exchange service number (with the NPA-NXX designation) that has been called, regardless of the identity or status of the called party. [FN26] The fact that the called party may offer an information service, such as access service to the packet-switched Internet, does not change the local nature of the circuit-switched call carried over the BellSouth and MFS/WorldCom networks. [FN27] Similarly, the Federal Communications Commission ('FCC') has stated that it defines 'termination' for purposes of Section 251(b)(5) as the switching of local traffic at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. [FN28] MFS/WorldCom cited other examples in its briefs of rulings and statements by the FCC that support the conclusion that calls to ISPs are local. [FN29] This Commission does not consider itself bound by such FCC statements, but does believe that they reinforce the determination that ISP traffic is local in nature. In addition, they provide further indication that during the relevant time period of the negotiations and contracting between the parties, ISP traffic was understood to be local in nature. [FN30]

The Commission further finds that MFS/WorldCom showed persuasively that BellSouth has always treated calls from its end users to the ISPs that it serves (which have local exchange service numbers associated with the same local calling area) as local traffic. For example, when a BellSouth customer places a call to a telephone number used by an ISP within the BellSouth customer's local calling area, BellSouth treats the call as a local call for that subscriber pursuant to the terms of BellSouth's local exchange tariff, regardless of which carrier provides the service to the ISP. BellSouth also treats the revenues associated with traffic originating

on BellSouth's network and terminating at an ISP within the originating caller's local calling area as a local call for the purposes of jurisdictional separations and ARMIS reports, regardless of whether the ISP is on BellSouth's or on a CLEC's network. BellSouth also sells services to ISPs pursuant to the rates, terms, and conditions in its local exchange tariff, which is the same tariff under which other businesses obtain local exchange service from BellSouth. [FN31]

The Commission finds and concludes that ISP traffic is subject to the Commission's jurisdiction. MFS/WorldCom has argued persuasively that end users who are ISPs should not be considered a separate class of subscribers such that calls carried to them are jurisdictionally different from other local calls. The information services provided by the LEC customers, including Internet services provided by ISPs, may include interstate services. However, the telecommunications services which are provided by BellSouth and MFS/WorldCom and which are at issue here are local and subject to this Commission's jurisdiction.

*5 Both BellSouth's and MFS/WorldCom's customers have purchased local exchange service from their chosen local exchange provider, from that provider's local exchange tariff. [FN32] Moreover, MFS/WorldCom made the striking argument that if ISP traffic were deemed interstate rather than local and under this Commission's jurisdiction -- that is, accepting BellSouth's end- to-end theory -- then BellSouth would violate Section 271 of the Telecommunications Act every time a BellSouth customer connected with BellSouth's ISP. Section 271 of the Act prohibits the provision of in-region originating interLATA service by a Bell Operating Company until certain conditions related to the development of local competition have been satisfied. BellSouth countered that in such circumstances, it is providing an interstate access service, not an interstate transport service. However, if it were providing itself with 'access' service, BellSouth through its own affiliated ISP would still be offering interLATA service. Furthermore, BellSouth's service to ISPs is provided out of BellSouth's local exchange tariff, not at local exchange rates under its intrastate access tariff. [FN33]

BellSouth initially pointed to an arbitrator's decision in Texas that ISP traffic should not be subject to reciprocal compensation, [FN34] however, this decision was made by a single Commission Staff member acting as an arbitrator. On February 5, 1998, the Texas Public Utility Commission reversed the arbitrator's ruling. The Commission's chairman concluded, 'I do feel comfortable that (a) we have jurisdiction; that (b) these are local calls that should be compensated accordingly; and that (c) I don't really see any ability or desire on my part to undo a business contract.' [FN35] Southwestern Bell appealed the Texas PUC's reversal of the arbitrator's decision to the U.S. District Court for the Western District of Texas, Midland-Odessa Division. The District Court denied Southwestern Bell's appeal, holding that, '[T]he PUC correctly determined that it had jurisdiction over the telecommunications component of internet access and the local calls made to ISPs. Furthermore, the PUC correctly interpreted the Southwestern Bell- Time Warner interconnection agreement as unambiguous, and it correctly ordered Southwestern Bell to comply with the agreement's reciprocal compensation terms for termination of local traffic.' [FN36]

The United States District Court for the Northern District of Illinois upheld a similar result reached by the Illinois Commerce Commission. [FN37] The Court upheld the I.C.C.'s decision on two separate grounds: First, the I.C.C. properly concluded, based on its interpretation of industry practice, that a call

'terminates' at the ISP, thus making it a local call subject to reciprocal compensation. [FN38] Second, the agreements at issue unambiguously provided that reciprocal compensation is applicable to local traffic billable by Ameritech, and Ameritech bills calls to ISPs as local calls. [FN39]

*6 BellSouth asserted that ISP traffic is not 'jurisdictionally local.' ICG Telecom Group, Inc. ('ICG') countered that BellSouth's position disregards the fact that there is no such thing as 'jurisdictionally local' telecommunications traffic. American jurisprudence recognizes telecommunications traffic as either jurisdictionally intrastate traffic, which generally is regulated by the states, and jurisdictionally interstate traffic, which is regulated by the FCC. [FN40] BellSouth contended that the end-to-end communication between an Internet service subscriber and a remote computer from which the subscriber obtains information is jurisdictionally interstate and therefore cannot be local. ICG responded that the issue is not whether the FCC or this Commission has jurisdiction over particular telecommunications traffic, but how the agency with jurisdiction has defined the traffic at issue. ICG pointed out that the FCC has consistently characterized the circuit-switched communications link between an Internet subscriber and his or her ISP as a 'local call,' and BellSouth cannot dispute this. While the FCC may have characterized the ISP's information service as an interstate service, it has never characterized the call to the ISP as an interstate or non-local call.

ICG summarized BellSouth's position as this: At a time when regulators, telecommunications carriers, ISPs, and users all consistently referred to calls to ISPs as local calls (as all but some ILECs do today), and when BellSouth itself treated such calls as local calls for all other purposes (as it still does today), BellSouth nonetheless believed that it was so clear that such calls are actually a switched exchange access service and not local calls that it was unnecessary to discuss the issue with MFS, to include such calls in the Agreement's definition of switched exchange access service, or to agree upon a procedure for identifying as non-local these calls that are treated as local for every other purpose. The Commission agrees that these are post hoc rationalizations that do not support BellSouth's refusal to pay reciprocal compensation for ISP traffic.

As MFS/WorldCom stated in its post-hearing brief filed October 2, 1998, twenty-one (21) jurisdictions have decided the issues thus far, and in every case the incumbent LEC has failed to persuade either the state regulatory agency or the three federal courts and one state court that have reviewed state agency decisions on appeal. These jurisdictions have ruled both on the basis of contract compliance, and on the basis of concluding that ISP traffic is local and is subject to state commission jurisdiction.

The Commission finds and concludes that the Hearing Officer correctly ruled that ISP traffic is local in nature. The Commission further finds and concludes that ISP traffic is subject to the jurisdiction of this Commission. In addition, the Commission finds and concludes that the provisions of the MFS-BST Agreement do govern these matters and do provide that reciprocal compensation must be paid for ISP traffic. Therefore, as a matter of contractual compliance, BellSouth must pay reciprocal compensation to MFS/WorldCom for ISP traffic.

B. The Hearing Officer Correctly Concluded that the Commission Has the Authority to Enforce the Interconnection Agreement.

*7 BST cited Georgia Public Service Commission v. Atlanta Gas Light Company, 205 Ga. 863, 55 S.E. 2d. 618, 633 (1949), as holding that it is beyond the jurisdiction of the Commission to award compensatory damages. That case is distinguishable from the present matter. In Georgia Public Service Commission v. Atlanta Gas Light Company, the Court dealt with a dispute over service under differing tariffs. The Court held that the Commission lacked authority to compensate customers who had purchased gas at the more expensive rate through the implementation of a rate adjustment tantamount to a retroactive rate. The rule against retroactive ratemaking does not apply in this case. Here, there is no question of attempting to make a rate adjustment apply retroactively.

More importantly, while the Hearing Officer characterized his order as awarding compensatory damages, the Commission is actually interpreting and ordering compliance with the Interconnection Agreement and its prior order approving that agreement. The Commission has the authority to construe the contract and the relevant provisions of the federal and state acts, as well as to impose penalties for violations of its orders. In this instance the Commission is charged with the implementation and administration of the Georgia Act. O.C.G.A. § 46-5-168(a). Without the power to enforce the terms of interconnection agreements the Commission would not have the statutorily mandated authority to implement and administer the provisions of the Georgia Act. The Telecommunications Act also imposes on BST the duty to establish reciprocal compensation arrangements, 47 U.S.C. § 251 (b)(5), and this Commission conducted arbitration for and approved the MFS-BST Agreement in Docket No. 6759-U pursuant to 47 U.S.C. § 252(b) and § 252 (e). As the Eighth Circuit Court of Appeals stated in Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753, 804 (8th Cir.1997), 'state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved.' State commission authority to enforce these terms, compared to FCC authority, is especially appropriate given the local nature of the calls at issue in this case.

Inherent in the Commission's authority to enforce the interconnection agreement is the authority to order parties to that agreement to fulfill the obligations to remit compensation required under the agreement. Moreover, without such authority, the Commission's power to approve the agreement would be useless because the parties would be under no obligation to honor the terms of the approved agreement. The Commission has been given the authority to enforce its orders through the imposition of fines. See O.C.G.A. § 46-2-91.

C. Opening of a Generic Proceeding on Pricing Policy.

The Commission does believe that it is appropriate to review the question of whether the traditional approaches to reciprocal compensation for local traffic provide the most appropriate method of cost recovery and cost sharing with respect to ISP traffic. The Commission does recognize the argument of MFS/WorldCom that totally refusing to pay the interconnecting CLEC for terminating calls originating on BellSouth's network enables BellSouth to utilize the CLEC's equipment and facilities without compensation. Denying reciprocal compensation for ISP traffic would be anticompetitive, if not confiscatory, and thus contrary to the goals of

both the Georgia Act and the Telecommunications Act.

*8 However, the method of paying reciprocal compensation on a minutes-of- use basis for ISP traffic which often involves local telephone calls lasting for hours may not reflect appropriate cost causation and cost recovery. Therefore the Commission will open a generic proceeding to address whether it may be appropriate to adopt a new pricing policy with respect to reciprocal compensation, especially reciprocal compensation for ISP traffic. The Commission recognizes that it is bound by the bar against retroactive ratemaking, however. Thus any new pricing policy cannot be given retroactive effect, and must operate only prospectively from the date of any Commission Order that may adopt such a new pricing policy.

D. Conduct of an Evidentiary Hearing.

BellSouth argued that in order to determine whether MFS/WorldCom and BellSouth agreed in their Interconnection Agreement that calls to ISPs were to be treated as local calls, an evidentiary hearing was necessary, and that the Hearing Officer erred in rendering his decision without an evidentiary hearing. BellSouth's argument relied upon parole evidence to interpret the plain language of the contract. BellSouth argued that there was no meeting of the minds with regard to the treatment of ISP traffic, and that the Commission must hold an evidentiary hearing to determine whether there was a meeting of the minds.

The counter argument was that the issue involved whether calls to ISPs are 'local calls,' and that neither party disputed the definition as it appears in the Agreement. Thus, it could be argued that there was no material fact at issue with regard to the definition. Since the issue to be decided was based upon the Commission's interpretation of the asserted facts and an existing definition, no evidentiary hearing may have been required. Further, the MFS-BST Agreement was subject to this Commission's approval pursuant to Section 252(e) of the Telecommunications Act.

However, the Commission decided to conduct an evidentiary hearing as part of its review of the Hearing Officer's initial decision. This hearing was to the benefit of the Commissioners in reviewing the issues. The Commission stated that it wished to ensure that the issue received thorough examination at the Commission level, so it may be appropriate to conduct an evidentiary hearing in reviewing the case. [FN41] The Commission's taking of evidence did not necessarily constitute a ruling that BellSouth's argument on this point was correct or that the Hearing Officer erred in ruling without taking evidence. However, it is clear that the conduct of the evidentiary hearing has rendered moot BellSouth's argument on this point. Therefore, the Commission reaches no conclusion regarding whether the Hearing Officer was required to conduct an evidentiary hearing before issuing the initial decision.

III. CONCLUSIONS AND ORDERING PARAGRAPHS

The Commission upholds and affirms the ruling of the Hearing Officer that calls placed by BST end users to ISPs who are customers of MFS/WorldCom are local calls

and therefore subject to the requirement of section 5.8 of the MFS- BST Agreement for reciprocal compensation.

*9 The Commission upholds and affirms the ruling of the Hearing Officer that the Commission has authority and jurisdiction over this matter pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and the Georgia Act, O.C.G.A. § § 46-5-160 et seq.

The Commission finds and concludes that ISP traffic is local in nature, and is subject to this Commission's jurisdiction. These findings and conclusions have general applicability not limited to the contract dispute in this particular case, and thus shall have precedential effect.

The Commission upholds and affirms the Hearing Officer's ruling that the Commission has the authority to order compliance with the Interconnection Agreement. The Commission further concludes that it has the authority to determine the parties' obligations and to impose penalties or seek other enforcement actions for any violations of its orders. Failure to comply with the reciprocal compensation obligations as determined in this order would be a violation of this order as well as the Commission's previous order approving the Interconnection Agreement between MFS and BellSouth.

The Commission determines that the parties should submit documentation of the amounts of compensation past due, as well as documentation of payment of such amounts, to comply with the Interconnection Agreement. BellSouth shall also comply with any applicable provisions in the MFS-BST Agreement relating to interest rates.

The Commission determines that it should open a generic proceeding to address whether it may be appropriate to adopt a new pricing policy with respect to reciprocal compensation, especially reciprocal compensation for ISP traffic. Any new pricing policy, however, would only be effective on a prospective basis.

WHEREFORE IT IS ORDERED, that BellSouth Telecommunications, Inc. must comply with the reciprocal compensation terms of the MFS-BST Agreement, which this Commission construes and interprets as requiring reciprocal compensation payments to MFS/WorldCom for the termination of local calls, including ISP traffic, i.e., calls terminating with information service providers and internet service providers who are customers of MFS/WorldCom, where both the BST customer and the MFS/WorldCom customer bear NPA- NXXX designations associated with the same local calling area of BellSouth Telecommunications.

ORDERED FURTHER, that ISP traffic, i.e., calls originating from customers of one local exchange carrier and terminating with information service providers and internet service providers who are customers of another local exchange carrier, where both the originating LEC customer and the terminating LEC customer bear NPA-NXXX designations associated with the same local calling area of BellSouth Telecommunications, is subject to this Commission's jurisdiction.

ORDERED FURTHER, that ISP traffic, i.e., calls originating from customers of one local exchange carrier and terminating with information service providers and internet service providers who are customers of another local exchange carrier, where both the originating LEC customer and the terminating LEC customer bear NPA-NXXX designations associated with the same local calling area of BellSouth

Telecommunications, is local in nature.

*10 ORDERED FURTHER, that no later than thirty (30) days from the entering of this Order, MFS/WorldCom shall present to BellSouth, and file with the Commission under this Docket No. 8196-U, documentation showing the compensation under the MFS-BST Agreement that is past due from BellSouth.

ORDERED FURTHER, that the parties shall submit filings within 45 days of the issuance of this Order agreeing upon the amount of compensation that is past due and either documenting that the payments have been made, or setting forth a mutually agreed schedule for the making of such payments. BellSouth shall also comply with any applicable provisions in the MFS-BST Agreement relating to interest rates. Any disputes regarding the amount of compensation or the payments, or petitions related to enforcement of the Commission's orders, must be submitted to the Commission with a request for expedited resolution.

ORDERED FURTHER, that the Commission's conclusions that ISP traffic is subject to the jurisdiction of this Commission and that ISP traffic is local in nature are general conclusions not limited to the circumstances of the contract in this case, and that these conclusions shall have precedential effect.

ORDERED FURTHER, that the Commission will open a generic proceeding to address whether it may be appropriate to adopt a new pricing policy with respect to reciprocal compensation, especially reciprocal compensation for ISP traffic. Any new pricing policy, however, will not be given retroactive effect.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 15th day of December, 1998.

FOOTNOTES

FN1 WorldCom Technologies, Inc. is the successor in interest to MFS/WorldCom. On October 17, 1997, the Commission granted the application of MFS/WorldCom, WorldCom Inc., and WorldCom Technologies Inc. to transfer the certificates of authority held by MFS/WorldCom to WorldCom Technologies, Inc. as the surviving entity of a corporate reorganization. Order, Docket No. 7803-U, October 17, 1997.

FN2 Subsequently, ACSI received approval to do business under the name 'e.spire

Communications.'

FN3 GPSC Hearing Tr. 40-41.

FN4 Petition of MFS/WorldCom Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al. (Arizona Corp. Comm. Oct. 29, 1996) at 7.

FN5 Petition of MFS/WorldCom Communications Company, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Decision Regarding Petition for Arbitration, Docket No. 96A-287T, at 30 (Col. PUC Nov. 5, 1996). The Colorado Public Utilities Commission has since affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. The Investigation and Suspension of Tariff Sheets filed by US West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services, Docket No. 96A-331T, Commission Order , at 8 (Colo. P.U.C. July 16, 1997).

FN6 Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic, Docket No. 97-05-22, Decision (Conn. D.P.U.C. Sept. 17, 1997).

FN7 Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. On October 1, 1997, the Commission confirmed that decision rejecting a BA-MD Petition for Reconsideration.

FN8 M.C.L. § 484.2202(g) provides that, 'It is the stated public policy in Michigan that access to ISP's by local exchange customers shall be accomplished by completing a local call'.

FN9 Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS/WorldCom Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to section 252(b) of the Federal Telecommunications Act of 1996, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76.

FN10 In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company, Arbitration Order, Case No. TO-98-278 (Mo. P.S.C., April 23, 1998).

FN11 Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y.P.S.C. July 17, 1997). The Order also instituted a proceeding to consider issues related to Internet access traffic. Comments and Reply Comments have been filed.

FN12 Petition of US LEC of North Carolina, LLC to Enforce Interconnection Agreement, Order Concerning Reciprocal Compensation for ISP Traffic, N.C.U.C. Docket No. P-55 (Feb. 26, 1998).

FN13 In the Matter of the Complaint of ICG Telecom Group, Inc. v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation, Opinion and Order, O.P.U.C. Case No. 97-1557-TP-CSS (Aug. 27, 1998).

FN14 In the Matter of the Application of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company, Final Order, Cause No. PUD 970000548, Order No. 423626 (O.C.C., June 3, 1998).

FN15 Petition of MFS/WorldCom Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Section 252(b) of the Telecommunications Act of 1996, Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13.

FN16 Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc., Opinion and Order, P.P.U.C. Case No. P- 00971256 (June 16, 1998).

FN17 Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, T.R.A. Docket No. 98- 00118, Order Affirming the Initial Order of Hearing Officer (Aug. 17, 1998). The Hearing Officer of the T.R.A. issued the Initial Order on April 21, 1998.

FN18 Petition of Cox Virginia Telcom, Inc. for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers, Final Order, Case No. PUC970069 (Va. S.C.C., Oct. 24, 1997).

FN19 Petition for Arbitration of an Interconnection Agreement between MFS Communications Company, Inc., and US WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252, Arbitrator's Report and Decision, Docket No. UT- 960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26., aff'd, U.S. West Communications, Inc. v. MFS Intelenet, Inc., Case No. C97-222WD (W.D. Wash., Jan. 7, 1998).

FN20 MCI Telecommunications Corp. Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations between MCI and Bell Atlantic -- West Virginia, Inc., Case No. 97-1210-T-PC (W.V. P.S.C., Jan. 13, 1998).

FN21 Contractual Dispute about the Terms of an Interconnection Agreement between Ameritech Wisconsin and TCG Milwaukee, Inc., Letter Order, Docket Nos. 5827-TD-100, 6720-TD-100 (Wisc. P.S.C., May 13, 1998); and Contractual Dispute about the Terms of an Interconnection Agreement between Ameritech Wisconsin and Time Warner Communications of Milwaukee, L.P., Letter Order, Docket No. 5912- TD-100 (Wisc. P.S.C., June 10, 1998).

FN22 Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief, F.P.S.C. Docket No. 971478-TP (first of four consolidated cases), Final Order Resolving Complaints (Sept. 15, 1998).

FN23 Hearing Tr. 40; Ball prefiled testimony at 6-9; Tr. 237 [Hendrix].

FN24 Hearing Tr. 238 [Hendrix].

FN25 Jackson prefiled testimony at 7-8. See also Hearing Officer's Initial Decision at 4.

FN26 The Communications Standard Dictionary defines 'service termination' as '(1) Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable tariffs; (2) In a switched communications system the point at which the common carrier service ends and user provided service begins, i.e., the interface point between the communications system equipment and the user terminal equipment, under applicable tariffs.' Communications Standard Dictionary, Martin H. Weik, D.Sc. (3d Ed.), Chapman & Hall (1996).

FN27 Compare also 47 U.S.C. Section 153(20) (definition off information service) with 47 U.S.C. Section 153(46) (definition of telecommunications service).

FN28 In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (August 8, 1996), para. 1040.

FN29 MFS/WorldCom Post-Hearing Brief at 22-29, 31.

FN30 BellSouth's August 12, 1997 letter regarding the reciprocal compensation provision with respect to ISP traffic also implies that, prior to that time,

BellSouth billed MFS/WorldCom and other CLECs reciprocal compensation when a call by a WorldCom end user was placed to the telephone number of an ISP served by BellSouth where the ISP's telephone number was associated with the same local calling area as the WorldCom end user.

FN31 BST Answer at paras. 24-25; Ball prefiled testimony at 8-9; Jackson prefiled testimony at 4-5.

FN32 Ball prefiled testimony at 8.

FN33 Hearing Tr. 231, 240-241 [Hendrix].

FN34 BellSouth Reply Brief in initial proceedings, Docket No. 8196-U, dated January 20, 1997, pg. 10-13.

FN35 Complaint of Waller Creek Communications, Inc. for Arbitration with Southwestern Bell Telephone Co., Transcript of Open Meeting (Tex. PUC February 5, 1998), at 26-27.

FN36 Order in Southwestern Bell Telephone Company v. Public Utility Commission of Texas; Pat Wood, III; Judy Walsh; Patricia A. Curran; Time Warner Communications of Austin, L.P.; Time Warner Communications of Houston, L.P.; and Fibercom, Inc., Case No. MO-98-CA-43 (W.D. Texas, June 16, 1998), Slip Op. at 27. On July 20, 1998, the District Court denied a motion by Southwestern Bell to alter or amend the judgment. Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, et al., Case No. MO-98-CA-43 (W.D. Texas, July 20, 1998).

FN37 Teleport Communications Group, Inc. v. Illinois Bell Telephone Company (Ameritech Illinois) (first titled of four consolidated cases), Order, I.C.C. Case No. 97-0404 (March 11, 1998).

FN38 Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al., No. 98 C 1925 (N.D. Illinois, July 21, 1998), Slip Op. at 26-28.

FN39 Id., Slip Op. at 25.

FN40 ICG Post-Hearing Reply Brief at 2.

FN41 Order Granting BellSouth's Petition for Review, Docket No. 8196-U, Aug. 20, 1998, at 4.

PUR Slip Copy, 1998 WL 1034305 (Ga.P.S.C.)

END OF DOCUMENT