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July 2, 2007

Via Hand Delivery

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 000475-TP
Complaint by Bellsouth Telecommunications, Inc., against Thrifty Call, Inc.
regarding practices in the reporting of percent interstate usage for compensation
for jurisdictional access services

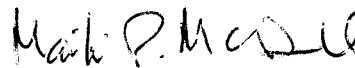
Dear Ms. Cole:

Enclosed for filing on behalf of Thrifty Call, Inc., please find an original and 15 copies of Thrifty Call, Inc.'s Response in Opposition to AT&T Florida's Motion for Summary Final Order and Motion for Continuance.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for assistance with this filing.

Sincerely,



Martin P. McDonnell

CMP	_____
COM	<u>3</u>
CTR	_____
ECR	_____
GCL	<u>2</u> MPM/vp
OPC	Enclosures
RCA	<u>1</u>
SCR	_____
SGA	_____
SEC	_____
OTH	_____

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DOCUMENT NUMBER-DATE

05298 JUL-26

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:)
)
) Docket No. 000475-TP
)
) Complaint by BellSouth Telecommunications, Inc.)
) against Thrifty Call, Inc. regarding practices in the)
) reporting of percent interstate usage for compensa-)
) tion for jurisdictional access services)
)
_____)

Docket No. 000475-TP

Filed: July 2, 2007

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**THRIFTY CALL, INC.'S RESPONSE IN OPPOSITION
TO AT&T FLORIDA'S MOTION FOR SUMMARY FINAL ORDER
and
MOTION FOR CONTINUANCE**

Thrifty Call, Inc. ("Thrifty Call"), pursuant to Rule 28-106.204(4), Florida Administrative Code, and by and through undersigned counsel, respectfully submits this response in opposition to AT&T Florida's ("AT&T") Motion for Summary Final Order. AT&T's Motion for Summary Final Order must be denied because it is premature and fails to conclusively demonstrate the nonexistence of an issue of material fact.

REQUIREMENTS FOR JUDGMENT ON THE PLEADINGS

Section 120.57(1)(h), Florida Statutes, provides that summary judgment may be granted only when there is no genuine issue of material fact, and upon a showing that the movant is entitled to entry of a final order as a matter of law:

A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

See also Rule 1.510(c), Florida Rules of Civil Procedure, which similarly provides that summary judgment may be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹

As movant herein, AT&T must conclusively demonstrate that Thrifty Call is not entitled to prevail, and that AT&T is entitled to a summary final order. AT&T therefore must establish that all legal issues must be resolved in its favor and must conclusively prove the complete lack of any genuine issue of material fact in connection with its complaint. *Bradham v. Hayes Enterprises, Inc.*, 306 So. 2d 568 (Fla. 1st DCA 1975). AT&T may utilize affidavits in order to meet this burden, but such affidavits must “set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Rule 1.510(c), Fla. R. Civ. Pro.

As the Florida Supreme Court has confirmed, if, and only if, AT&T tenders competent evidence demonstrating the *nonexistence* of any genuine issue of material fact, will the burden shift to Thrifty Call to come forward with evidence:

[B]efore it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party.

* * *

¹ This Commission has recognized that case law regarding summary judgment under the Florida Rules of Civil Procedure is applicable to motions for summary final order. Order No. PSC-02-1554-FOF-WU, pg. 7, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities Inc.*, July 27, 2001.

The rule simply is that the burden to prove the non-existence of genuine triable issues is on the moving party, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden.

Holl v. Talcott, 191 So.2d 40 at 43-44 (Fla. 1966), conformed to 192 So.2d 76; citations omitted. Thus, Thrifty Call has no obligation to produce counterevidence until and unless AT&T meets its initial burden of proof. *Hervey v. Alfonso*, 650 So.2d 655 (Fla. 2d DCA 1995), reh. den. Further, every possible inference must be drawn in favor of the party against whom a summary judgment is sought. *Green v. CSX Transportation, Inc.*, 626 So.2d. 974 (Florida 1st DCA 1993).

Summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law." *Christin v. Overstreet Paving Company*, 679 So.2d 839 (Fla. 2d DCA 1996). In fact, Florida Courts have held that "[e]ven where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment." *Franklin County v. Leisure Properties, Ltd.*, 430 So.2d 475, 479 (Fla. 1st DCA 1983). Summary judgment should be cautiously granted, and if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact. *McCraney v. Barberri*, 677 So.2d 355 (Fla. 1st DCA 1996). Finally, if the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that a fact issue might exist, summary judgment is not proper. *Albelo v. Southern Bell*, 682 So.2d 1126 (Fla. 4th DCA 1996); *Besco USA Intern. Corp. v. Home Sav. of America, FSB*, 675 So.2d 687 (Fla. 5th DCA 1996); *St. Pierre v. United Pacific Life Ins. Co.*, 644 So.2d 1030 (Fla. 2d DCA 1994).

BACKGROUND

This docket has a somewhat unusual procedural history. It was opened on April 21, 2000, upon Bellsouth's complaint against Thrifty Call to recover alleged unpaid intrastate access charges that resulted when Thrifty Call allegedly reported erroneous percent interstate usage ("PIU") factors to Bellsouth. On May 16, 2000, Thrifty Call filed its Motion to Dismiss or in the Alternative, to Stay, which was denied by Order dated August 31, 2000. Thereafter, Thrifty Call filed a Petition for Declaratory Ruling at the Federal Communications Commission ("FCC") seeking clarification of the meaning and application of certain provisions of BellSouth's interstate access tariff. Accordingly, on August 20, 2001, Thrifty Call filed its Motion to Stay, or in the Alternative, to Bifurcate the Proceedings, asking the Commission to stay the proceedings in this docket pending the outcome of the FCC proceedings.

Shortly after Thrifty Call filed its Motion, the Commission issued its Order Establishing Procedure in this docket. Order No. PSC -01-1749-PCO-TP, issued on August 28, 2001, set forth the following controlling dates:

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.

In that same Order, the Commission set March 28, 2002 as the date for completion of discovery and issued a tentative list of issues, as follows:

- 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 Bell South?

On November 21, 2001, however, the Commission granted Thrifty Call's motion to stay until "the FCC issues a ruling on question number 4 of the Petition for Declaratory Ruling submitted by Thrifty Call." See Order No. PSC-01-2309-PCO-TP, pg. 7. Accordingly, Thrifty Call did not file direct testimony in the matter or otherwise engage in any discovery addressing the tentative issues list in the Commission's Order Establishing Procedure issued August 28, 2001.

Four years later, on November 2, 2005, in Order No. PSC-05-1100-PCO-TP, the Commission granted Bellsouth's Motion to Lift the Previously Imposed Stay and Establish a Procedural Schedule. In that Order, the prehearing officer held ". . . the stay is lifted in this proceeding and **a separate order to establish procedure will be issued.**" (Order, page 2 emphasis supplied). The Commission has not yet issued an order to establish procedure in the instant docket. Obviously, such an order would provide Thrifty Call with the opportunity to file testimony and conduct discovery as required under Chapter 120, Florida Statutes and as provided by the initial procedural order.

On the same day it issued its Order granting BellSouth's motion to lift the stay, this Commission granted the motion of Thrifty Call's former counsel to withdraw from representation. Order No. PSC-05-1101-PCO-TP, issued November 2, 2007. Thrifty Call, while still a party, thus was unrepresented by counsel in this matter from November 2, 2005 until June 25, 2007.

ARGUMENT

A. AT&T's Motion for Summary Final Order is Premature.

This Commission has recognized that granting summary disposition must be done cautiously, because it “brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his claim.” Order No. PSC-98-1538-PCO-WS, citing *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So.2d 707, 709 (Fla. 4th DCA 1997). The *Bifulco* court further held that “[t]he procedural strictures [on summary judgment in the Florida Rules of Civil Procedure] are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are **not merely procedural niceties nor technicalities.**” *Id.*, emphasis in original.

Section 120.57(1)(h), Florida Statutes, and Rule 1.510(c), Florida Rules of Civil Procedure authorize a motion for summary final order only if the “pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits” demonstrate that there is “no genuine issue as to any material fact...” This Commission has recognized that summary disposition is premature – and in fact, the Commission is not even in a position to decide whether a genuine issue of material fact exists – until parties have had the opportunity to complete discovery and file testimony. Order No. PSC-00-2388-AS-WU, pg. 6, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*, December 13, 2000, citing *Brandauer v. Publix Super Markets, Inc.*, 657 So.2d 932 (Fla. 2nd DCA 1995). Accord, *Singer v. Star*, 510 So. 2d 637 (Fla. 4th DCA 1987) (summary judgment is premature when discovery has not yet been completed). Even after testimony has been filed, however, the Commission has declined to rely upon it to demonstrate or negate issues of material fact in connection with a motion for summary disposition because such testimony is unsworn and will

remain so until adopted by the witness at hearing. Order No. PSC-98-1538-PCO-WS, *In re: Application for certificates to operate a water and wastewater utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc.*, November 20, 1998.

In the instant case, the record simply has not been sufficiently developed to permit the Commission to determine whether any genuine issues of material fact exist. To date, there are no depositions, answers to interrogatories or admissions on file, and the only pleading in this docket is AT&T's Complaint.² The Commission has not yet issued a new Order establishing procedure as directed in Order No. PSC-05-1100-PCO-TP, and the factual issues enunciated in Order No. PSC-01-1749-PCO-TP have never been addressed through discovery, testimony, exhibits or prehearing statements. Additionally, pursuant to Order No. PSC-01-1749-PCO-TP, the issues identified therein were "tentative." In keeping with the explicit terms of the Order and the Commission's practice of many years, parties may continue to raise issues, including factual issues, until the Commission issues its prehearing order. Finally, the parties have not begun discovery or filed testimony, and there is no procedural schedule that would require them to do so.³ Accordingly, AT&T cannot demonstrate that there is no genuine issue of material fact because the parties have not yet finished the process of identifying material facts at issue. AT&T's motion therefore is premature and must be denied.

² See Rule 1.100(a), Florida Rules of Civil Procedure, which defines pleadings.

³ Clearly, Thrifty Call was entitled to rely on the terms of Order No. PSC-05-1100-PCO-TP that granted AT&T's motion to establish a procedural and held that such a schedule would, indeed, be established, before beginning its discovery and filing testimony. The fact that such a schedule has not yet been established neither justifies nor supports AT&T's Motion for Summary Final Order, particularly when AT&T specifically requested the Commission not to take further action on the docket for several months. See letter from John T. Tyler to Blanca Bayo filed on February 22, 2007.

B. AT&T's Motion for Summary Final Order Must be Denied as it Fails to Conclusively Demonstrate the Nonexistence of an Issue of Material Fact

As noted above, AT&T must conclusively prove the complete lack of any genuine issue of material fact in connection with its complaint. AT&T has not met this burden. Contrary to AT&T's assertions in its Motion, there are previously-identified disputed issues of material fact that AT&T does not address, let alone negate. In Order No. PSC-01-1749-PCO-TP, issued August 28, 2001, the Commission identified, among others, the following factual issues:

1. What are the terms and conditions of the tariff associated with correcting and back billing misreported PIU?
2. Has Bellsouth complied with its tariff provisions?

These two factual issues remain in dispute today and have not been addressed by either the parties nor the Commission. Thrifty Call continues to assert that Bellsouth has not complied with its tariff provisions regarding correcting and back billing PIU, and Thrifty Call is entitled to a determination by this Commission whether in fact Bellsouth is in compliance with the pertinent tariff provisions.

Further, while AT&T asks the Commission to rely upon orders of other regulatory agencies in determining whether there are disputed issues of material fact, such orders are not properly considered in connection with a motion for summary disposition. *See* Section 120.57(1)(h), and Rule 1.510(a) and (e), which limit the Commission's consideration to "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits...." and therefore "excludes from consideration on a motion for summary judgment any document that is not one of the enumerated documents or is not a certified attachment to a

proper affidavit.” *Bifulco*, 709. The orders upon which AT&T relies are neither enumerated in Section 120.57(1)(h) and Rule 1.510, nor are they certified attachments to a proper affidavit. Accordingly, they are entitled to no consideration whatsoever. AT&T’s Motion merely recites the existence and content of an order that it incorrectly asserts was issued by the FCC, and provides an uncertified copy of an order apparently issued by the North Carolina Utility Commission. Neither is admissible in evidence and neither can qualify as summary judgment proof. *Bifulco*, *supra*.

Additionally, even if the Commission could properly consider the orders cited by AT&T, those documents would not demonstrate the nonexistence of genuine issues of material fact in this case. The North Carolina order is not binding or even relevant to the instant dispute in that it does not resolve the Florida-specific factual issues identified above, while the FCC order upon which AT&T relies was not actually issued or considered by the FCC. Rather, by its terms, it was issued by the Chief of the FCC’s Wireline Bureau rather than the agency itself and therefore is subject to full FCC review.⁴

Finally, Thrifty Call is entitled to an opportunity to contest the staff audit report upon which AT&T relies. There is no procedure in Chapter 120 that permits the Commission to deny Thrifty Call its rights to a factual hearing under Section 120.57 based on the results of a staff audit. Further, the affidavit provided by AT&T does not demonstrate or prove the contents of the audit – it merely recites that AT&T’s witness reviewed and agrees with it. The affidavit is thus nothing more than hearsay. The audit itself is not before the Commission and – like the orders

⁴ In fact, an Application for Review of the order was filed on or about December 13, 2004 and is still pending. See Application for Review, In the Matter of Thrifty Call, Inc. Petition for Declaratory Ruling, Concerning Bellsouth Telecommunications, Inc., Tariff F.C.C.N. 1, filed in FCC Docket No. CB/CPD File No. 01-17.

cited by AT&T – is not proper summary judgment proof in any event. AT&T has failed to conclusively demonstrate the lack of genuine issues of material fact and must be denied.

MOTION FOR CONTINUANCE

Thrifty Call intends to conduct discovery and thereafter, to file testimony in this docket pursuant to the schedule dictated in the anticipated forthcoming scheduling order. As set forth above, Thrifty Call urges the Commission to deny AT&T’s Motion for Summary Final Order, in part, because the motion is premature. Alternatively, Thrifty Call requests the Commission to continue any hearing on AT&T’s Motion until after the close of discovery as set forth in the procedural order to be issued in this docket. *Brandauer v. Publix Super Markets, Inc.*, 657 So.2d 932, 934 (Fla. 2nd DCA 1995)(“When an opponent of summary judgment is confronted with a hearing on the motion before he has completed discovery, he should file a motion for continuance.”).

RESPECTFULLY SUBMITTED this 2nd day of July, 2007.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to the following this 2nd day of July, 2007:

Adam Teitzman
Staff Counsel
Florida Public Service Commission
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Tallahassee, Florida 32399-0850

John R. Tyler
James Meza
BellSouth Telecommunications, Inc.
c/o Nancy Sims
150 South Monroe Street, Room 400
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