

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-08-0378-PHO-TP ISSUED: June 5, 2008
---	--

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on May 19, 2008, in Tallahassee, Florida, before Commissioner Lisa Polak Edgar, as Prehearing Officer.

APPEARANCES:

John Tyler, Esquire and Manuel A. Gurdian, Esquire, AT&T Florida
150 South Monroe Street, Suite 400, Tallahassee, Florida 32301
On behalf of BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida).

Martin P. McDonnell, Esquire, Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551, Tallahassee, Florida 32302
On behalf of Thrifty Call, Inc. (Thrifty Call).

H F. Rick Mann, Esquire and Charlene Poblete, Esquire
Florida Public Service Commission
2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission (Staff).

PREHEARING ORDER

I. CASE BACKGROUND

On April 21, 2000, BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) filed a complaint against Thrifty Call, Inc. (Thrifty Call). AT&T Florida alleges that Thrifty Call intentionally and unlawfully reported erroneous Percent Interstate Usage (PIU) factors to AT&T in violation of AT&T Florida's Intrastate Access Tariff and the rules and regulations established by the Commission. AT&T Florida alleges that erroneous PIUs have resulted in the under reporting of intrastate access terminating minutes to AT&T Florida, causing AT&T Florida financial harm.

On August 20, 2001, Thrifty Call filed a Motion to Stay or in the Alternative, to Bifurcate the Proceedings. On August 28, 2001, Order No. PSC-01-1749-PCO-TP was issued, establishing procedure. On September 4, 2001, AT&T Florida filed its Opposition to Thrifty Call's Motion to Stay or in the Alternative, to Bifurcate the Proceedings. On November 21, 2001, Order No. PSC-01-2309-PCO-TP was issued, granting Thrifty Call's Motion to Stay.

DOCUMENT NUMBER-DATE

04806 JUN-5 g

FPSC-COMMISSION CLERK

On July 20, 2005, AT&T Florida filed a Motion to Lift Stay and Establish Procedural Schedule. On November 2, 2005, Order No. PSC-05-1100-PCO-TP was issued, granting AT&T Florida's Motion to Lift Stay and Establish Procedural Schedule. That same day Order No. PSC-05-1101-PCO-TP was issued, granting the Motion for Leave to Withdraw as Counsel for Thrifty Call. Thrifty Call was thus without counsel in this docket from November 2, 2005, to June 18, 2007.

On June 5, 2007, AT&T Florida filed a Motion for Summary Final Order. On July 2, 2007, Thrifty Call filed its Response in Opposition to AT&T Florida's Motion for Summary Final Order and Motion for Continuance. On July 17, 2007, AT&T Florida filed a letter in response to Thrifty Call's Motion for Continuance.

On December 28, 2007, Order No. PSC-07-1027-PCO-TP was issued, modifying procedure. On March 11, 2008, AT&T Florida filed a Notice of Withdrawal of its Motion for Summary Final Order. On May 5, 2008, AT&T Florida filed a Motion to Compel Thrifty Call to respond to certain discovery requests. On May 7, 2008, AT&T Florida filed another Motion to Compel Thrifty Call to respond to certain discovery requests. On May 12, 2008, Thrifty Call filed its Response in Opposition to AT&T Florida's May 5, 2008, Motion to Compel.

II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 364, Florida Statutes (F.S.). This hearing will be governed by said Chapter and Chapters 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.

IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 119.07(1), F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending 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 this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, F.S.. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

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, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. 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.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

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 Office of Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties and Staff has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct and Rebuttal</u>		
Marc Potteiger**	AT&T Florida	1, 2, 3 and 4
Timothy J. Gates**	Thrifty Call	1, 4
Harold Lovelady*	Thrifty Call	1, 2, 3, 4
Denise Vandiver*	Staff	3

*Direct Only

**Direct and Rebuttal

VII. BASIC POSITIONS

AT&T

FLORIDA: In this matter, the Commission should find that Thrifty Call misreported its Terminating Percent Interstate Usage ("TPIU") factor to AT&T Florida in violation of AT&T Florida's Access Services Tariff. For the time period relevant to the complaint, Thrifty Call reported that 98% of its terminating traffic was interstate when, in fact 80.49% of its traffic was intrastate, while only 19.51% of the traffic was interstate in nature. The misreported TPIU was a clear violation of AT&T Florida's tariff and caused AT&T Florida financial harm by allowing Thrifty Call to avoid payment of the proper, tariffed terminating switched access rates, totaling \$2,383,220 over the twenty-six month period of misreporting. Additionally, in accordance with AT&T Florida's Intrastate Access Tariff, as of December 31, 2007, Thrifty Call owes AT&T Florida late payment penalties of \$11,426,632.

THRIFTY
CALL:

AT&T's complaint alleging that Thrifty Call misreported its PIU during the period of 1999 and 2000 mischaracterizes Thrifty Call's business policies and practices, which were prudent, sound, and appropriate. At that time, Thrifty Call utilized the entry exit surrogate ("EES") method of jurisdictionalizing its traffic, which had been approved by the FCC as early as 1986. Thrifty Call recognizes that years later, in 2004, the FCC's Wireline Competition Bureau issued an order

regarding the Bureau's interpretation of Bellsouth's tariff and the EES methodology, however Thrifty Call disagrees with the FCC Wireline Competition Bureau's conclusions.

Additionally, AT&T failed to follow the requirements of its own tariff regarding audit procedures and late charges and penalties. If the Commission finds that Thrifty Call is indebted to AT&T as a result of Commission Staff's audit, any damages should be limited to the principal amounts as calculated by witness Timothy J. Gates, and AT&T should not be allowed to inappropriately apply any late payments or penalties in violation of its tariff.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

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

POSITIONS

AT&T

FLORIDA: There is no time limitation contained in the tariff as to how far back AT&T Florida may go to collect from Thrifty Call unbilled revenues represented by the misreported TPIU factors. AT&T Florida is required to bill and collect the charges contained in its tariff from Thrifty Call for the misreported PIU. The language of the tariff does not preclude the Commission from awarding AT&T Florida backbilled intrastate access charge payments and AT&T Florida is seeking a Commission order that would require Thrifty Call to compensate AT&T Florida for unbilled revenues represented by the misreported TPIU factors.

THRIFTY CALL:

Section E.2.3.14(D)1 of AT&T's tariff provides that when a dispute arises between AT&T and the carrier customer (Thrifty Call) pertaining to the PIU, AT&T may require the customer "to provide the data the IC or end user used to determine the projected intrastate percentage." Section E.2.3.14(D)1 clearly limits the applicability of audit results to a period of four calendar quarters:

"Company will adjust the IC or end user's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit was completed, the usage for the quarter prior to completion of

the audit, and to the usage for two (2) quarters following the completion of the audit.”

Section E.2.3.14(D)1 requires customers to maintain relevant data for the most recent six month period. Therefore, in April 2000, when the instant Complaint was filed, Thrifty Call was required to maintain data only for the third and fourth quarter of 1999. It would be inconsistent therefore for the Commission to rule that Thrifty Call is indebted to AT&T for any period prior to the third quarter of 1999, especially in light of the fact that there are no records supporting any claim. To the extent the results of the audit were to have been used to update AT&T's invoices to Thrifty Call, the tariff dictates that the invoices for the third and fourth quarters of 1999 would have been potentially impacted. (See AT&T's Intrastate Access Services Tariff section E.2.3.14(D)1.)

Finally, AT&T's tariff does not allow any claim for late payment interest or penalties. The pertinent tariff provision relied on by AT&T clearly addresses end user uncollectible amounts after the end user has been properly invoiced. AT&T has never invoiced the amounts it now claims for late payment penalties, and thus AT&T failed to comply with its own tariff. (See AT&T's Intrastate Access Services Tariff at section E.2.4.1.)

STAFF: Staff has no position at this time.

ISSUE 2: Has AT&T complied with its tariff provisions?

POSITIONS

AT&T
FLORIDA: Yes.

THRIFTY
CALL: No. AT&T has not complied with its tariff provisions regarding the audit procedures wherein a dispute arises regarding the reporting of PIU. Specifically, AT&T initiated the audit by letter and abruptly abandoned its own tariff provisions and filed the instant Complaint.

STAFF: Staff has no position at this time.

ISSUE 3: Has Thrifty Call misreported its PIU to AT&T?

POSITIONS

AT&T

FLORIDA: Yes. The Commission Staff conducted an audit of Thrifty Call. The audit studied traffic routed over AT&T Florida's network by Thrifty Call, to ascertain whether or not the classification of the traffic for billing purposes was consistent with the specific type of traffic actually transmitted. The Commission's audit team found that the actual traffic routed over AT&T Florida's interconnection facilities was different than what was indicated by Thrifty Call for billing purposes. Although Thrifty Call reported that during the period of July, 1999 through December, 1999, 98% of the traffic it sent over AT&T Florida's interconnection facilities was interstate traffic, the staff audit indicates that during that period 80.49% of the traffic was actually intrastate and only 19.51% of the traffic was actually interstate in nature.

THRIFTY

CALL: Thrifty Call has not misreported its PIU to AT&T. During the 1999-2000 time period, Thrifty Call utilized the EES method of jurisdictionalizing its traffic that was terminated to AT&T. Thrifty Call recognizes the ruling of the FCC's Wireline Competition Bureau regarding this issue and disputes it.

STAFF: Staff has no position at this time.

ISSUE 4: If Thrifty Call has misreported its PIU to AT&T, what amount, if any, does Thrifty Call owe AT&T and when should this amount be paid?

POSITIONS

AT&T

FLORIDA: The misreported TPIU factors caused AT&T Florida financial harm by allowing Thrifty Call to avoid payment of the proper, tariffed terminating switched access rates, totaling over \$2,383,220 over the twenty-six month period of misreporting. Additionally, in accordance with AT&T Florida's Intrastate Access Tariff, as of December 31, 2007, Thrifty Call owes AT&T Florida late payment penalties of \$11,426,632.

THRIFTY

CALL: Thrifty Call did not misreport its PIU to AT&T. If the Commission finds otherwise, AT&T should only be allowed to recover actual damages as illustrated in TJG-1. Tariff section E2.3.14(D)(1) expressly and unambiguously limits any PIU revision resulting from an audit to the quarter when the audit is completed, to the immediate prior quarter, and then to the next two quarters going forward. Therefore, even if the Commission recognizes AT&T's request for relief, by the

terms of AT&T's own tariff, recovery is limited to the quarter prior to which the audit was initiated and any claims going forward from the audit. Finally, AT&T's tariffs in effect at the time of this dispute, when read *in pari materia*, completely preclude the award of any late payment penalties on the purported principal amounts due. Pursuant to Tariff section E2.4.1.(B) (2), if AT&T believed it was entitled to impose additional usage charges, it was required to render timely invoices for those charges. Late charges can only accrue after an invoice is rendered. Finally, section E2.4.1.(B) (3), (the tariff provision that AT&T claims calls for a late payment penalty in this case,) unequivocally limits the imposition of a late payment penalty to the failure to pay a bill on time. In short, there is no basis to apply penalties to amounts that have never been billed.

STAFF: Staff has no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Marc Potteiger	AT&T Florida	MP-1	Calculation of Amount Owed by Thrifty Call to AT&T Florida
Marc Potteiger	AT&T Florida	MP-2	Relevant Portions of AT&T Florida's Access Services Tariff
Marc Potteiger	AT&T Florida	MP-3	Commission Staff's Audit Report
Marc Potteiger	AT&T Florida	MP-4	Switched Access-Terminating MOU Chart
Marc Potteiger	AT&T Florida	MP-5	North Carolina Utilities Commission Recommended Order Ruling on Complaint
Marc Potteiger	AT&T Florida	MP-6	FCC Declaratory Ruling
Timothy J. Gates	Thrifty Call	TJG-1	Qualifications of Timothy J. Gates
Harold Lovelady	Thrifty Call	HL-1	Audit letter dated January 18, 2000 from J. Henry Walker
Harold Lovelady	Thrifty Call	HL-2	Letter dated February 10, 2000 from Danny E. Adams to J. Henry Walker
Harold Lovelady	Thrifty Call	HL-3	Letter dated March 22, 2000 from Danny Adams to J. Henry Walker

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Denise Vandiver	Staff	DNV-1	Staff Audit Report
Denise Vandiver	Staff	DNV-2	Staff Audit Work Papers

Rebuttal

Marc Potteiger	AT&T Florida	MP-7	North Carolina Utilities Commission Order Denying Motion and Setting Hearing
Timothy J. Gates	Thrifty Call	TJG-2	Pertinent calculations regarding alleged underpayments

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

There are no pending motions at this time.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. POST-HEARING PROCEDURES

If no bench decision is made, 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 this 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, that party shall have waived all issues and may be dismissed from the proceeding.


Pursuant to Rule 28-106.215, F.A.C., 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 25 pages and shall be filed at the same time.

XIV. RULINGS

Opening statements, if any, shall not exceed five minutes per party.
It is therefore,

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 5th day of June, 2008.


LISA POLAK EDGAR
Commissioner and Prehearing Officer

(S E A L)

HFM

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; 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, 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

ORDER NO. PSC-08-0378-PHO-TP

DOCKET NO. 000475-TP

PAGE 11

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.