ORIGINAL

RECEIVED-FPSC

00 JAN 11 PM 4:37

RECORDS AND REPORTING

LAW OFFICES
MESSER, CAPARELLO & SELF
A PROFESSIONAL ASSOCIATION

215 SOUTH MONROE STREET, SUITE 701
POST OFFICE BOX 1876
TALLAHASSEE, FLORIDA 32302-1876
TELEPHONE: (850) 222-0720
TELECOPIERS: (850) 224-4359; (850) 425-1942
INTERNET: www.lawfla.com

January 11, 2000

BY HAND DELIVERY
Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 991751-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of Thrifty Call, Inc. are an original and fifteen copies of Thrifty Call's Motion to Dismiss, or, in the Alternative, to Stay in the above captioned docket. We will forward a stamped filed copy of Exhibit "A" along with its attachments as soon as we receive it.

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

Thank you for your assistance with this filing.

Sincerely,

Floyd R. Self

AFA 4
APP
CAF
CMU
CTR
EAG
LEG
MAS
OPC
RRR
SEC 1
WAW
OTH

FRS/amb
1 Enclosure
cc: Danny E. Adams, Esq.
Parties of Record

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
00479 JAN 11 00
FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Sprint-Florida, Incorporated regarding the practices of Thrifty Call, Inc. in the reporting of percent interstate usage for compensation for jurisdictional access services	)))))	Docket No. 991751-TP Filed: January 11, 2000

THRIFTY CALL, INC.'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY

Thrifty Call, Inc. ("Thrifty Call"), pursuant to Rule 28-106.204(2), Florida Administrative Code, hereby moves that the Florida Public Service Commission ("FPSC") dismiss the Complaint and Notice of Carrier Disconnection ("Complaint") of Sprint Florida, Inc. ("Sprint") in this docket, or, in the alternative, stay these proceedings pending resolution of Thrifty Call's Petition for Declaratory Ruling ("Petition") to the Federal Communications Commission ("FCC") which has exclusive jurisdiction to address the issues raised in Sprint's Complaint. In support of this Motion, Thrifty Call states:

1. On November 22, 1999, Sprint filed with the FPSC in this docket its Complaint against Thrifty Call alleging misreporting of Percent Interstate Usage ("PIU") factors to Sprint in violation of Sprint's Florida intrastate tariff. The Complaint was filed by Sprint in both a confidential unredacted version and a redacted public record version, along with the appropriate request for confidential classification and emergency motion for protective order to govern the confidential information filed by Sprint.

2. On November 23, 1999, the FPSC's Division of Records and Reporting served on Thrifty Call a copy of the redacted version of the Complaint. Because this was the redacted copy, pertinent information in the Complaint and its supporting exhibits were not made available to Thrifty

Call, so Thrifty Call was not fully informed as to allegations made in Sprint's Complaint.

3. After discussions with counsel for Sprint, Thrifty Call and Sprint entered into a protective and nondisclosure agreement regarding access to and use of the confidential information contained within Sprint's Complaint. On the basis of the execution of these documents, on or about December 22, 1999, Sprint provided a copy of the unredacted Complaint to counsel for Thrifty Call. By further agreement between counsel for Thrifty Call and Sprint, December 22, 1999, was agreed upon as the service date of the Complaint on Thrifty Call, and January 11, 2000, was agreed upon as the appropriate date for Thrifty Call's responsive pleading to the Complaint.

4. On January 10, 2000, Thrifty Call filed with the FCC its Petition requesting that the FCC assert jurisdiction over Sprint's Complaint as disputes regarding PIU measurement methods lie exclusively within the jurisdiction of the FCC. If the state utility commissions were allowed to proceed independently of the FCC, then the current national policy for uniform LEC access charge billing will not be maintained. A copy of Thrifty Call's FCC Petition is attached hereto and incorporated herein as Exhibit A to this Motion.

5. As Thrifty Call sets forth more fully in its Petition, the resolution of the subject of Sprint's FPSC Complaint lies with the FCC. As such, the FPSC should dismiss Sprint's Complaint and allow this issue to be resolved in the correct forum, the FCC. Alternatively, if the FPSC does not dismiss Sprint's Complaint, the FPSC should stay these proceedings until such time as the FCC rules on Thrifty Call's Petition. Dismissal, or at least a stay of all further actions until an FCC ruling, is appropriate for several reasons.

6. First, as Thrifty Call more fully explains in its Petition, the subject of Sprint's Complaint involves a dispute over whether Thrifty Call has correctly reported interstate traffic. The

regulation of interstate communications lies within the exclusive jurisdiction of the FCC, and the FCC has specifically asserted federal preemption with respect to PIU reporting methods. Thrifty Call has calculated its PIU consistent with such Federal rules and reported such information to Sprint. For the FPSC to attempt to determine the character of the calls at issue in Sprint's Complaint before the FCC has had the opportunity to rule would be to improperly and illegally infringe upon the jurisdiction of the FCC and raise the prospect of Thrifty Call being forced to comply with two contrary rulings. Motorola Communication and Electronics, Inc. v. Mississippi Public Service Commission, 515 F. Supp. 793 (S.D. Miss. 1979). The FPSC does not have concurrent jurisdiction with the FCC to determine matters within the FCC's jurisdiction. Thus, this matter should be dismissed or, at least, stayed pending the FCC's determination as to the scope of its jurisdiction.

7. Dismissal or staying the instant proceeding would also be consistent with Florida law. It is well settled under Florida law that in a state court proceeding when the question of FPSC jurisdiction has been raised, then the court should defer its proceedings to the FPSC even when there is only "a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by the state." Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990). Thrifty Call's claim to the FCC is even more than a "colorable claim." Thus, application of the same principle to the Sprint Complaint compels the FPSC to dismiss or at least stay Sprint's Complaint until resolution by the FCC.

WHEREFORE, Thrifty Call respectfully requests the entry of an order dismissing Sprint's Complaint. If the FPSC determines that dismissal is not appropriate at this time, then this Commission should stay these proceedings of any further action, including any Thrifty Call answer,

until a ruling by the FCC on Thrifty Call's Petition

Respectfully submitted this 11th day of January, 2000.

FLOYD R. SELF, ESQ.
MESSER, CAPARELLO & SELF, P. A.
Post Office Box 1876
Tallahassee, FL 32302-1876
(850) 222-0720

and

DANNY E. ADAMS, ESQ.
Kelley Drye & Warren, L.L.P.
Suite 500
1200 19th St., N.W.
Washington, DC 20036
(202) 955-9600

Attorneys for Thrifty Call, Inc.

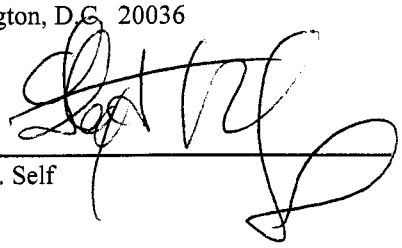
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (*) and/or U. S. Mail this 11th day of January, 2000.

Beth Keating, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Charles J. Rehwinkel
Susan Masterton
F. Ben Poag
Sprint-Florida, Incorporated
MC FLTHO0107
P.O. Box 2214
Tallahassee, FL 32399-2214

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



Floyd R. Self

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Petition by	)
	)
THRIFTY CALL, INC.	)
	)
For Issuance of a Declaratory Ruling	)
Reaffirming Exclusive Federal Jurisdiction To	)
Determine Percentage Interstate Usage for	)
Exchange Access Services	)

To: The Commission

PETITION FOR DECLARATORY RULING

THRIFTY CALL, INC.

Danny E. Adams
Melissa M. Smith
Counsel for Thrifty Call, Inc.
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600

Its Attorneys

Dated: January 11, 2000

TABLE OF CONTENTS

SUMMARY

Thrifty Call seeks this Declaratory Ruling because it faces unlawful demands from Sprint Local Telephone Companies for retroactive – and unilaterally imposed – revisions to its PIU reports, in direct contravention of FCC rulings and Sprint Local's own interstate access tariff. Sprint Local has attempted to escape FCC policies by bringing its claim before State PUCs, despite the fact that PIU decisions are inherently federal matters. Grant of this Petition is necessary to prevent Sprint Local from forcing Thrifty Call to defend lengthy and costly proceedings before State PUCs that have no jurisdiction to hear PIU matters. Moreover, the FCC should grant this Petition in order to protect its own exclusive jurisdiction over PIU decisions.

Sprint Local's contention that this is purely a matter of intrastate access charges is wholly disingenuous. Thrifty Call does not challenge the State PUCs' authority to set intrastate access rates; however, states cannot revise a PIU contrary to FCC policies and Sprint Local's FCC tariffs. The jurisdictional separations process, which includes PIU measurement, is inherently federal. Access charges are applied only *after* the PIU characterizes access minutes as either interstate or intrastate. By definition, then, State PUCs cannot hear backbilling claims for access charges without also first implicitly revising the PIU contrary to FCC policies.

In 1989, following a Federal-State Joint Board recommendation, the FCC adopted the "entry-exit surrogate" ("EES") method of jurisdictional separation of access calls. The EES method was implemented through a system based on carrier reporting and, where called for, subsequent verification audits. This system was required for access charge billing, as well as jurisdictional separations, because to do otherwise would risk over or under recovery of LEC access costs. Thus, the Commission expressly stated that "where both [federal and state] jurisdictions employ a minute of use billing approach, the measurement surrogate *must* be the

same to assure that 100%, and only 100%, of the minutes are billed."

The LECs were instructed to implement this scheme in their interstate access tariffs. Sprint Local's Tariff F.C.C. No. 1 cites to the FCC's *1989 EES Order* for PIU determinations. It does not provide for retroactive revision of PIU reports, nor for backbilling based on any backward looking revision. In fact, the tariff's only reference to the topic expressly prohibits backbilling. This position is consistent with FCC policy, which has always severely restricted any LEC attempt to introduce retroactivity or backbilling into their access tariffs.

In September 1999, Sprint Local invoked its FCC tariff and asked Thrifty Call for information to support its PIU reports. Thrifty Call provided supporting information. Sprint Local then claimed this information was inadequate and demanded that Thrifty Call supply confidential customer information and, additionally, insisted on revising the PIU (1) retroactively, with corresponding backbilling, and (2) unilaterally on a going-forward basis pending the audit. Thrifty Call objected, pointing out that neither FCC rulings nor the Sprint Local tariff permit such actions. Sprint Local responded by terminating access services to Thrifty Call in Florida and North Carolina and filing formal complaints with the Florida PSC and North Carolina Utility Commission, where it hopes to get FCC policies on PIU overruled.

Thrifty Call asks the FCC here to correct Sprint Local's erroneous view of the law so that Thrifty Call is not forced to endure lengthy and costly state PUC hearings which seek relief beyond the jurisdiction of the state agencies to give. Further, the FCC should grant the Petition because, if it does not prevent Sprint Local's attempt to undermine exclusive federal authority over PIU matters, the "uniform, nationwide" separations and access charge billing scheme envisioned by the Joint Board and the FCC's *1989 EES O*rder will be nullified and replaced with precisely the atomized approach which it intended to prevent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Petition by	)
	)
THRIFTY CALL, INC.	)
	)
For Issuance of a Declaratory Ruling	)
Reaffirming Exclusive Federal Jurisdiction To	)
Determine Percentage Interstate Usage for	)
Exchange Access Services	)

To: The Commission

PETITION FOR DECLARATORY RULING

Thrifty Call, Inc. ("Thrifty Call"), by its attorneys, hereby seeks a Declaratory Ruling reaffirming exclusive federal jurisdiction to determine interexchange carriers' ("IXC") percentage of interstate usage ("PIU") for exchange access services. This ruling should make clear that the FCC-mandated methodology must be followed and that any action in setting PIU must be consistent with that methodology and with the carriers' federal tariffs implementing the FCC regulations.

INTRODUCTION

Thrifty Call is a certificated IXC offering both interstate and intrastate services to carrier customers in several states. In the Southeast, Thrifty Call provides wholesale services in Georgia, Florida and North Carolina. Some of the services sold by Thrifty Call terminate calls to Sprint Local Telephone Companies ("Sprint Local") in those states.

The Declaratory Ruling sought by this Petition is necessary because Sprint Local is currently attempting to employ the processes of state public utility commissions ("State PUCs") to dictate to Thrifty Call a PIU that is contrary to both the FCC's prescribed methods of

PIU measurement and Sprint Local's FCC tariff. By taking its PIU claim to the State PUCs and asking those agencies to rule that state policies and tariffs contrary to the FCC's rulings govern PIU determinations, Sprint Local is attempting to obtain an adjudication of an important federal principle in a state forum that Sprint Local perceives to be more favorable to its position but which does not have the jurisdiction to resolve the issues relating to the underlying principle of federal communications law. In short, Sprint is attempting to remove its access charge relations with other carriers from the purview of the FCC, whose policies it rejects, and put them before the State PUCs where it hopes to obtain a different result. If the FCC does not reaffirm its exclusive jurisdiction over PIU determinations to prevent this effort to undermine its authority to set national PIU policy, the result will be inconsistent decisions in numerous forums and a breakdown of the uniform national scheme that the Commission and a Federal-State Joint Board have heretofore established.

I. BACKGROUND

A. The EES Method of Measurement

The "entry-exit surrogate" ("EES") approach to measuring PIU was adopted by the FCC on an interim basis in *MCI Telecommunications Corp.*, FCC 85-145 (April 16, 1985) ("*1985 EES Order*"). The *1985 EES Order* also established a Federal-State Joint Board to consider and make recommendations regarding the issue of interstate and intrastate usage of FGA and FGB access services. In 1989, the Commission adopted the Joint Board's recommendations which, among other things, recommended continuation of the EES approach. *See Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services*, 4 FCC Rcd 8448 (1989) ("*1989 EES Order*").

The Federal-State Joint Board decision adopted by the FCC recommended

reliance on the "unadjusted EES method" as the "best available technique for jurisdictional determination of FGA and FGB traffic for cost separations purposes because it is relatively easy to implement and administer . . ."[1] The *1989 EES Order* went on to describe the Joint Board's finding that the EES approach should not include adjustments proposed by some to address "false" intrastate traffic because there are so many variations based on "geography, population and network characteristics" that no greater accuracy would result from such adjustments.[2] In order to deal with anomalous situations, however, the Joint Board "recommended that any carrier proposing a modification to the EES approach . . . be required to obtain prior approval of the proposed substitute from the relevant state commission(s), as well as [the FCC]."[3] Any such request would be required to include a detailed and specific showing as described in the *1989 EES Order.*

Importantly, the Joint Board further concluded that "the EES method should be used for access charge billing purposes" as well. To do otherwise, the Joint Board concluded, could potentially cause problems of "federal and state jurisdictions [billing] for the same minutes of use." To address this important issue, the Joint Board concluded that

> to the extent that states and LECs use a per minute of use rate structure for intrastate access charge billing purposes, [the states and LECs] should use the EES method, or an authorized substitute method.[4]

The Joint Board also addressed verification procedures. In order to ensure that the LECs did not impose "unreasonably burdensome or inconsistent verification procedures," the

---

1 *1989 EES Order* at 8449.
2 *Id.*
3 *Id.*
4 *Id.*

decision recommended limiting guidelines for inclusion in LEC tariffs. These limitations included restrictions on the frequency and nature of verification audits.

In adopting the Joint Board recommendations, the FCC noted the need for "a permanent uniform solution" to the PIU problem because "in the absence of a uniform measurement method . . . a LEC could conceivably recover in both the interstate and intrastate jurisdiction for the same investment and expense . . ."[5] Importantly, the FCC adopted the Joint Board recommendations for both jurisdictional separations purposes *and* for interstate access charge billing purposes.[6]

Finally, the Commission agreed with the Joint Board about the need for uniformity between federal and state policies because, "if this were not the case, a mismatch in costs and revenues could result."[7]

> To avoid these potential adverse consequences, we direct the LECs to use the EES measurement method in their interstate access tariffs. We also agree with the Joint Board that the states and the LECs should use an intrastate billing approach that avoids the problems that could potentially occur if each jurisdiction billed for the same minutes of use. Clearly, where both jurisdictions employ a minute of use billing approach, the measurement surrogates **must** be the same to assure that 100%, and only 100% of the minutes are billed.[8]

Thus, the Commission's *1989 EES Order* asserted federal jurisdiction over the PIU measurement methods to ensure a uniform national policy for LECs to use in their access charge billing. The LECs were ordered to implement these policies through tariff revisions scheduled to become effective on January 1, 1990.

---

5 *Id.*
6 *Id.* at 8450.
7 *Id.*
8 *Id.* (emphasis added).

To date, the Commission has not altered its adoption of the EES approach to measuring PIU. In fact, in 1993, the Commission endorsed the continuation of the EES approach. "[In the *1989 EES Order*], we adopted the EES as a surrogate for measuring the PIU for feature group A and B. The EES has worked as a surrogate. . ." *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 8 FCC Rcd 3114 ¶ 22 (1993). Thus, the EES approach articulated by the Commission in 1989 remains in effect today.

B. The Present Controversy between Thrifty Call and Sprint Local

Thrifty Call purchases interstate access services from Sprint Local pursuant to its federal access tariff filed with the Commission and allowed to become effective pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203.[9] Under the tariff, carriers are required to report their PIUs for FGA and FGB switched access service and for other services where the jurisdictional nature of the traffic is not automatically identified. *See* Sprint Local Tariff F.C.C. No. 1 Section 2.3.11(A)(1)(b). The calculation of PIU is an important factor in determining a carrier's liability for access services provided by Sprint Local in certain states (*e.g.*, Florida and North Carolina) because the rates for interstate access regulated by the FCC are much lower than the rates imposed by Sprint Local's North Carolina and Florida intrastate access tariffs.

Sprint Local's Tariff F.C.C. No. 1 interstate access provisions include the following language in Section 2.3.11(A)(1)(b) for calculating PIU:

> Pursuant to Federal Communications Commission order F.C.C. 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

[9] The relevant sections of Sprint Local's interstate access tariff are appended hereto as *Attachment A*.

> communications 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 station number) is situated is an interstate communication.

Pursuant to this interstate access tariff, Thrifty Call is required to provide Sprint Local with periodic jurisdictional PIU reports using the EES method to serve as the basis for prospective billing. *See* Sprint Local Tariff F.C.C. No. 1 Section 2.3.11(A)(7)(a). However, the tariff does *not* authorize retroactive adjustments in PIU, nor has the FCC ever permitted them. In fact, both Section 2.3.11(A)(6) and Section 2.3.11(A)(7)(a) prohibit Sprint Local from using revised PIU reports as a basis to backbill carriers. Section 2.3.11(A)(6) states in relevant part: "The revised report will serve as the basis for future billing and will be effective on the next bill date. *No prorating or backbilling will be done based on the report.*" (emphasis added). Thus, the only mention of retroactive PIU revision or backbilling in the Sprint Local interstate access tariff is an explicit prohibition on the practice.

The Sprint Local interstate access tariff also provides audits to verify PIU reports. *See* Sprint Local Tariff F.C.C. No. 1 Section 2.3.11(B). That portion of the tariff, however, does *not* provide for retroactive revision of the PIU, nor for backbilling based on any such retroactive revision. In fact, the FCC has permitted only very limited backbilling of this sort. Moreover, the Sprint Local tariff does not provide for a broad-ranging audit inquiry including submission of carrier contracts and other customer data, nor does it include a unilaterally imposed PIU during the pendency of an audit.

Thrifty Call calculates its PIU according to the EES methodology prescribed by the FCC and reports it to Sprint Local. However, Thrifty Call received a series of letters from

Sprint Local dated August 16, 1999,[10] September 24, 1999,[11] and October 8, 1999,[12] invoking Sprint Local's interstate access tariff and demanding that Thrifty Call provide certain information for an on-site audit. The purported purpose of the audit was to verify the reported PIU for traffic being terminated to Sprint Local.[13] Thrifty Call responded by providing certain call detail records to Sprint Local.[14] At the same time, however, Sprint Local also demanded agreement to both retroactive PIU revision (with backbilling) and, during the pendency of the audit, interim reliance on a PIU set unilaterally by Sprint Local. Sprint Local subsequently began rendering invoices to Thrifty Call based on Sprint Local's unilaterally revised PIU. Sprint Local further demanded that the Thrifty Call PIU audit include disclosure by Thrifty Call of large amounts of highly confidential business information that is entirely irrelevant to the audit, including the names of all Thrifty Call's carrier customers, copies of its contracts with those customers, and copies of all correspondence with those customers.[15] Thrifty Call refused to

---

[10] *See* Letter from Jane B. Wrenn, National Account Manager of Sprint, to Dena Bishop, CABS Manager of Thrifty Call, dated August 16, 1999, appended hereto as *Attachment B* ("August 16, 1999 Letter").

[11] *See* Letter from Joseph P. Cowin, Senior Attorney of Sprint, to Jerry James, EVP of Governmental Affairs and Business Development of Thrifty Call, dated September 24, 1999, appended hereto as *Attachment C* ("September 24, 1999 Letter").

[12] *See* Letter from Jane B. Wrenn, National Account Manager of Sprint, to Jerry James, EVP of Governmental Affairs and Business Development of Thrifty Call, dated October 8, 1999, appended hereto as *Attachment D* ("October 8, 1999 Letter").

[13] *See* August 16, 1999 Letter.

[14] *See* Letter from Jerry James, EVP of Governmental Affairs and Business Development of Thrifty Call, to Jane B. Wrenn, National Account Manager of Sprint, dated September 15, 1999, appended hereto as *Attachment E.*

[15] *See Attachment C and Attachment D* appended hereto.

cooperate further in the audit until Sprint Local withdrew its extortionate and unlawful conditions.[16]

Sprint Local then dropped its reliance on its federal access tariff and, on November 22, 1999, filed a Complaint and Notice of Carrier Disconnection with the Florida Public Service Commission (1) attempting to retroactively revise the PIU and (2) based on this unlawful retroactive revision, to backbill Thrifty Call for alleged shortfalls in intrastate access services charges. On December 1, 1999, Sprint Local filed a similar Complaint and Petition for Injunctive Relief with the North Carolina Utilities Commission.[17] To compound its unlawful demands further, Sprint Local terminated service to Thrifty Call for failure to accede to the many unlawful audit conditions.[18]

II. THE FCC SHOULD ISSUE A DECLARATORY RULING REAFFIRMING THAT DETERMINATIONS CONCERNING PIU ARE WITHIN ITS EXCLUSIVE JURISDICTION

It is important for the Commission to reaffirm its jurisdiction and make clear that federal regulation prevails with respect to the calculation of PIUs. What is at stake is not simply the proper implementation of one statutory provision, but rather the entire scheme of federal regulation of rates and charges for interstate common carrier communications services. Interstate carriers' PIU reports are at the center of the calculation of such charges. If the Commission changes its policy and concedes to the states the authority to adjudicate claims of the type Sprint Local has made against Thrifty Call, it will in effect be ceding authority to

---

[16] *See* Letters from Danny E. Adams, Counsel for Thrifty Call, to Joseph P. Cowin, Senior Attorney for Sprint, dated October 11, 1999 and November 18, 1999, appended hereto as *Attachment F.*

[17] On December 3, 1999, the North Carolina Commission denied Sprint Local's Petition for Injunctive Relief and served the complaint on Thrifty Call.

[18] *See* Letter from Joseph P. Cowin, Senior Attorney of Sprint, to Danny E. Adams, Counsel for Thrifty Call, dated November 22, 1999, appended hereto as *Attachment G.*

determine whether calls are interstate or intrastate in nature, and thus empowering the states to establish the scope of the FCC's regulatory authority over common carrier services. The uniform, nationwide rules adopted by the FCC, in conjunction with the Federal-State Joint Board, will be nullified in the absence of FCC action.

A. The Commission Has Already Asserted Federal Primacy Over PIU Measurement

The central issue presented by this dispute – the appropriate methodology for calculating an interstate carrier's PIU – lies at the core of the FCC's jurisdiction over the relations between local and interexchange common carriers. Although Sprint Local contends to the State PUCs that its claim is for charges associated with intrastate access services, the substantive dispute does not involve the rates charged by Sprint Local for intrastate access. Thrifty Call does not challenge those rates (despite the fact Sprint Local charges vastly more for terminating an intrastate call than for performing the exact same function for interstate calls). Rather, the central question – the issue on which resolution of the entire dispute turns – is whether Thrifty Call properly calculated its percentage of interstate usage (which is the basis for calculating both interstate and intrastate access charges) under the EES approach dictated by the FCC's EES Orders and whether the federal policy (and Sprint Local's FCC tariff provisions) barring retroactive PIU revisions and backbilling can be overruled by bringing actions before State PUCs.

In fact, the FCC has already taken preemptive action in its *1989 EES Order.* After adopting a tentative *1985 EES Order,* the Commission referred the PIU issue to a Federal-State Joint Board. This lead to the adoption of the *1989 EES Order.* The fact that the FCC consulted with a Joint Board and then acted accordingly is itself a demonstration that federal rules concerning PIU are meant to prevail. The words of the *1989 EES Order* confirm this view.

> We also agree with the Joint Board that the states and the LECs should use an intrastate billing approach that avoids the problems that could potentially occur if each jurisdiction billed for the same minutes of use. Clearly, where both jurisdictions employ a minute of use billing approach, the measurement surrogates **must** be the same to assure that 100%, and only 100% of the minutes are billed.[19]

The LECs, including Sprint Local, were ordered to revise their access tariffs accordingly.[20]

B. FCC Policy Does Not Contemplate Retroactive Revision of PIU Reports

The Commission's long-standing policy on PIU measurement has relied on carrier reporting in the first instance. Other proposed approaches were rejected.[21] Verification of these carrier reports has always been permitted by means of audit. However, the Commission has never approved a LEC tariff which allowed retroactive revision of the PIU for more than a very short period as a result of such an audit.

For example, in 1992, BellSouth attempted to revise its interstate access tariff to permit retroactive PIU revision and backbilling. BellSouth Tr. 73, filed November 25, 1992. The FCC Staff refused to permit this tariff change to take effect as filed; instead, by Special Permission granted on February 19, 1993, a much more limited version of the retroactive PIU and backbilling tariff provision was permitted.[22] This revision provides that, following an audit, a PIU may be revised backwards (and bills adjusted accordingly) only to the beginning of the calendar quarter prior to the one in which the audit is completed. Even this provision is absent from the Sprint Local interstate access tariff. Thus, through the tariff review mechanism, the

---

19 *1989 EES Order* at 8450 (emphasis added).

20 *Id.*

21 See *1985 EES Order* at ¶¶ 26-28.

22 BellSouth Application No. 23 (February 25, 1993); BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4, 5 F.C.C. Rcd 716 (1990); BellSouth Telephone Revisions to Tariff F.C.C. No. 1, 8 F.C.C. Rcd 1403 (1993).

FCC has long imposed very severe limitations on a LEC's ability to revise the PIU retroactively following an audit. (It has never permitted a LEC to impose a PIU unilaterally as Sprint's invoices to Thrifty Call seek to do.)

The obvious corollary to a limitation on retroactive PIU revisions is an identical, corresponding limitation on backbilling. If the PIU for a prior period cannot be revised retroactively, then there is no basis for revising the billing for that period retroactively. Billing for access services is inseparable from the jurisdictional characterization of the minutes being sold.

The need for uniform federal regulation of these matters is crucial, as the *1989 EES Order* recognized. Only one regulatory authority can establish the criteria for determining whether a call is interstate or intrastate; shared authority over that determination would create the risk of conflicting decisions, resulting in some calls being deemed both interstate and intrastate for billing purposes. Moreover, it is impossible to separate the calculation of PIU for intrastate access purposes from the calculation of PIU for interstate access purposes. If the PIU is revised, by definition the minutes assigned to *both* the interstate and intrastate jurisdictions change correspondingly. Thus, even if a decision by a state public service commission or a state or federal court concerning PIU purported to affect only charges for intrastate access services, as Sprint Local would contend, it necessarily affects charges for interstate access services as well. It is therefore imperative that the FCC, not State PUCs and myriad federal and state courts, establish and enforce the criteria for determining whether a call is interstate or intrastate. That is why the Federal-State Joint Board was convened and the *1989 EES Order* was enacted.

Uniform federal regulation is also necessary to establish whether a discrepancy between PIU reports and audit results should be rectified retroactively or prospectively and the

default assumptions that should be applied when equipment is not available to determine the jurisdiction of each individual call on an automated basis. In each of these situations, whatever rule that is applied necessarily affects the carrier's interstate PIU; it is impossible to apply it in determining the intrastate PIU alone.

The dispute between Thrifty Call and Sprint Local provides an example of this dilemma. The Sprint Local interstate access tariff endorses the EES method of PIU measurement, as it must under FCC requirements. It contains no provision for retroactive PIU revisions following an audit, nor for corresponding backbilling based on such revision. Under long-standing law and FCC precedent, the silence of the Sprint Local tariff on retroactive revision of PIUs and backbilling in connection therewith requires that the tariff be construed in favor of the customer, *i.e.,* Thrifty Call. It is a "well settled rule" that when interpreting tariff language, the FCC must construe any ambiguities or omissions against the carrier who issued the tariff, and in favor of the customer.[23] If Sprint Local had intended its tariff to allow retroactive PIU revisions and backbilling, it could have drafted the tariff accordingly (using the dubious assumption that the Commission Staff would have permitted such a tariff). It is indisputable, however, that the current Sprint Local interstate access tariff lacks any such provisions.

Sprint Local seeks to thwart this FCC policy and avoid application of its own interstate tariff, however, by ignoring federal policies and tariffs and invoking the processes of State PUCs. Even after initially relying on its FCC tariff in its demands to Thrifty Call, Sprint

---

[23] *The Associated Press,* 72 F.C.C. 2d 760, 764-65 (1979), quoting *Commodity News Services, Inc.,* 29 F.C.C. 1208, 1213, aff'd 29 F.C.C. 1205 (1960). *See also United States v. ICC,* 198 F.2d 958, 966 (D.C. Cir.), *cert. denied,* 344 U.S. 893 (1952).

Local sought a ruling in the states – after Thrifty Call had pointed out that Sprint Local's claims are inconsistent with federal law and policy. However, any claim that its attempted backbilling is merely a State PUC matter under intrastate access tariffs is entirely illogical and nonsensical. The minutes of terminating access purchased by Thrifty Call from Sprint Local are allocated between the federal and state access tariffs by the PIU process. The PIU for July 1999, for example, determined the allocation of access minutes between the jurisdictions for that month. Before any backbilling for that month can be calculated, the PIU for that month must first be revised. Because federal law and policy does not permit a change to that July 1999 PIU at this time, there is no basis for a State PUC to consider revised access billing for that month. Moreover, it is obvious that no such backbilling can be considered by a State PUC apart from a retroactively revised PIU because the PIU and the number of minutes billed cannot be separated. To approve backbilling is to approve revision of the PIU.

It is this very kind of forum shopping which the FCC sought to prevent in adopting the *1989 EES Order*. As the FCC said then, "in the absence of a uniform measurement method . . ., a LEC could conceivable recover in both the interstate and intrastate jurisdiction for the same investment and expenses . . . "[24] The FCC must grant this Petition for Declaratory Ruling to ensure that the uniform national policy of the Joint Board and the Commission remains intact.[25]

C. Impact of Louisiana PSC v. FCC

Reaffirmation of exclusive FCC authority to impose a nationwide uniform policy on PIU calculation is entirely consistent with the limitations on the Commission's power to

---

[24] *1989 EES Order* at 8449.

[25] To the extent the FCC has any question about the nature or scope of its prior assertion of exclusive federal jurisdiction over PIU matters, the Commission should utilize this Petition to

preempt state regulation stated by the Supreme Court in *Louisiana Public Service Commission v. FCC,* 476 U.S. 355 (1986) (*"Louisiana PSC"*). In that decision, the Supreme Court noted that the Communications Act establishes a dual regulatory scheme, granting the Commission authority to regulate interstate and foreign communications while expressly reserving to the states jurisdiction over intrastate communications services. The Court held that Section 2(b) of the Act, 47 U.S.C. §152(b), constitutes a congressional denial of power to the FCC to require State PUCs to follow FCC-prescribed depreciation practices for intrastate ratemaking purposes.[26] *Id.* at 373. The Court noted that the Act itself establishes a "jurisdictional separations" process to determine what portion of an asset commonly used to provide both interstate and intrastate service should be allocated to each service. Thus, it is entirely feasible to apply different rates and methods of depreciation to commonly used plant once the correct allocation between interstate and intrastate use of an asset is made.

In reaching its decision in *Louisiana PSC,* the Supreme Court expressly recognized that the states' authority over intrastate telephone service is limited to the extent that the states' exercise of that authority would negate the exercise by the FCC of its authority over interstate communications. Thus, the FCC may preempt state regulation over intrastate communications to the degree necessary to prevent such regulation from negating the FCC's exercise of its authority over interstate communications services.[27] This is clearly such a case. As noted above, if a state were to establish a methodology for determining PIU for intrastate

---

clarify, expand or explain its view of permissible State PUC involvement in setting PIU.

[26] *Louisiana PSC,* 476 U.S. at 373.

[27] *Id.* at 375-76 n.4. *See also State of California v. FCC, 905* F.2d 1217, 1243 (9th Cir. 1990); *National Association of Regulatory Utility Commissioners v. FCC,* 880 F.2d 422, 425, 429 (D.C. Cir. 1989).

access purposes, and that methodology resulted in a lower PIU than the FCC-prescribed methodology, that adjustment would necessarily affect interstate access charges as well as intrastate access charges. State regulation of PIU would thus negate the exercise by the FCC of its lawful authority under Section 2 and Title II of the Act to regulate interstate communications.[28]

The Declaratory Ruling requested by Thrifty Call is fully consistent with the *Louisiana PSC* decision, in which the Court held that federal preemption of depreciation of dual jurisdiction property for intrastate ratemaking purposes was improper because it is possible to apply different rates and methods of depreciation to commonly used plant once the use of such plant is allocated between the interstate and intrastate jurisdictions. The jurisdictional allocation in that case still had to be made under FCC-supervised procedures. Likewise, in this case, calls must be jurisdictionally classified under standards set by the FCC. State authorities may set the rate for intrastate access, just as they may set depreciation rates for intrastate assets; but they may not jurisdictionally categorize either assets or calls. Only one regulatory authority can establish and enforce the demarcation line between the interstate and intrastate spheres, and that is the FCC. It is not feasible for both the FCC and its state counterparts to regulate how the percentage of interstate (and thus intrastate) usage is calculated. Accordingly, the Supreme Court's decision in *Louisiana PSC* indicates that preemption regarding a PIU calculation is a proper exercise of the Commission's discretion.

D. Preemption Subsequent to Louisiana PSC

The relief requested here is also consistent with the Ninth Circuit's decision in *California v. FCC,* 905 F.2d 1217 (9th Cir. 1990). In that decision, the Court of Appeals held

---

[28] *See Louisiana PSC,* 476 U.S. at 375-76 n.4.

that the record before it did not justify the broad scope of the Commission's preemption of state regulation of enhanced services – not that preemption of state regulation was impermissible. On remand, the Commission reinstated its preemption of state regulations, but carefully crafted its preemption order to cover only those aspects of state regulation that would interfere with the federal scheme. In a subsequent Ninth Circuit case, the Court of Appeals upheld an FCC regulation curbing state limitations on per-line blocking of Caller ID that were contrary to the FCC's goal of the promotion of nationwide interstate Caller ID. *See California v. FCC,* 75 F.3d 1350 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996). That is all Thrifty Call requests here – that the basic allocation of minutes between the interstate and intrastate jurisdictions and the resolution of any disputes which requires a determination of that allocation be deemed exclusively federal matters. Once the allocation to the intrastate jurisdiction has been determined under federal rules, the rate and method of payment for intrastate service would remain the province of state regulatory authorities.

The passage of the Telecommunications Act of 1996 ("1996 Act") did not change the analysis here. The principles of *Louisiana PSC* remain intact for those cases involving issues not specifically addressed under the 1996 Act. With respect to the provisions of the 1996 Act, the Supreme Court in *Iowa Utilities Board* concluded that the FCC has authority to implement its provisions. *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)("*Iowa Utilities Board*"). For example, the Court examined whether the FCC's pricing rules violated Section 252(c)(2), 47 U.S.C. § 252(c)(2), which assigns the establishment of rates to the State PUCs. The Court found no conflict because the states remain able to apply the FCC's methodology to specific circumstances to establish rates. Similarly, Thrifty Call requests that the FCC reaffirm its exclusive jurisdiction to determine the PIU methodology prior to its application at the state level.

CONCLUSION

For the foregoing reasons, Thrifty Call, Inc. respectfully requests that the Commission issue a Declaratory Ruling reaffirming exclusive federal jurisdiction to determine interexchange carriers' PIUs for exchange access services and declaring that matters of retroactive PIU revision are governed solely by FCC rules and implementing federal tariffs.

Respectfully submitted,

Danny E. Adams
Melissa M. Smith
Counsel for Thrifty Call, Inc.
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600

Its Attorneys

Dated: January 11, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2000, a true and correct copy of the foregoing *"Petition for Declaratory Ruling"* was served by overnight courier and hand delivery to the following:

Joseph P. Cowin, Esq.
Senior Attorney
Sprint
Legal & External Affairs
5454 West 110th Street
Mailstop KSOPKJ0505
Overland Park, KS 66211

Lawrence Strickling, Esq.
Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Andrea P. Essex