

ORIGINAL



Charles J. Rehwinkel
Senior Attorney

VP Law/External Relations
P.O. Box 2214
Tallahassee, FL 32316-2214
Voice 850 847 0244
Fax 850 878 0777
charles.j.rehwinkel@mail.sprint.com

January 24, 2000

Blanca Bayo', Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0853

Re: Docket 991751-TP Sprint's Response to Thrifty Call Inc.'s
Motion to Dismiss or, in the Alternative, to Stay

Dear Ms. Bayo':

Enclosed for filing in the above-referenced docket is the original and seven (7) copies of Sprint's Response to Thrifty Call Inc.'s Motion to Dismiss or, in the Alternative, to Stay.

Please indicate receipt of the enclosed by stamping a duplicate of this letter and returning same to the undersigned.

Sincerely,


Charles J. Rehwinkel

- AFA 4
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG _____
- INS _____
- OPR _____
- PLN _____
- YOUNG _____
- OTH _____

cc: Parties of Record

RECEIVED & FILED


FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

04002 JAN 24 8

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint - Florida, Incorporated Regarding)	Docket No. 991751-TP
The Practices of Thrifty Call, Inc. in the Reporting)	
of Percent Interstate Usage for Compensation for)	Filed: January 24, 2000
<u>Jurisdictional Access Services.</u>)	

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

COMES NOW, Sprint-Florida, Incorporated, ("Sprint") and files this objection to Thrifty Call, Inc.'s ("Thrifty Call") Motion to Dismiss or, in the Alternative, to Stay. The Florida Public Service Commission ("FPSC") should deny Thrifty Call's request in its entirety and expeditiously exercise its lawful jurisdiction to take all appropriate action in this matter. In support, Sprint states as follows:

I. On November 22, 1999 Sprint filed a Complaint ("Complaint") initiating this proceeding. The Complaint describes an unlawful scheme by Thrifty Call to convert or "launder" interexchange traffic originating and terminating within Florida into interstate traffic by falsely stating the Percent Interstate Usage (PIU). The scheme assumes that because the traffic, which originates and terminates, as to end users or callers, within Florida, is delivered by the originating Interexchange Carrier (IXC) to Thrifty Call at a point outside the state, it can be classified as an interstate call. Use of this subterfuge caused underreporting of intrastate traffic and hence underpayment of access charge revenue to Sprint for the termination of the traffic in question. Although Thrifty Call has since discontinued terminating all IXC traffic to Sprint, Sprint has been underpaid millions of dollars in Florida and continues to be harmed in terms of interest on past due amounts and other related costs. The Florida Public Service Commission continues to be without potential Regulatory Assessment Fee revenues applicable to improperly classified revenues.

DOCUMENT NUMBER-DATE
01002 JAN 24 8
FPSC-RECORDS/REPORTING

2. Thrifty Call responded to the Complaint by filing on January 10, 2000 a petition for declaratory ruling with the Federal Communications Commission (FCC) seeking a declaratory ruling that only the FCC can dictate the PIU methodology in all instances. The next day Thrifty Call filed the instant Motion for Dismissal/Stay. Service was via U.S. Mail, per the attached Certificate of Service. Both Thrifty Call filings are groundless, and appear to be an effort to delay FPSC judgement on the unlawful scheme.

3. Thrifty Call sets forth two bases for the consideration of its motion. First, they claim that the FCC has exclusive jurisdiction to determine PIU reporting methods -- even for the application of tariffs that are within the exclusive jurisdiction of the FPSC to administer and enforce. In support Thrifty Call contends that the FCC has entered an order preempting the FPSC from taking any action to adjudicate this matter since it involves the determination of the correct PIU. As shown below, the FCC has taken no such action. The second -- and closely related -- basis for urging abdication by the FPSC is that, since the FCC has putatively taken such preemptive action, the FCC has a colorable claim of exclusive jurisdiction and, thus, under a state law case, the FPSC should halt all action and defer to the FCC. As further demonstrated herein, the Commission should reject the underlying premise for the application of that case to this matter.

A. The Commission Should Reject Thrifty Call's Contention That The FCC Has Exclusive Jurisdiction.

4. FPSC should reject Thrifty Call's mythical contention that the FCC has asserted exclusive jurisdiction over PIU reporting methods by mandating an entry-exit surrogate (EES) PIU methodology, at least with respect to the traffic at issue here. The Commission need not reach or address the issue of FCC preemption since the service in question is Feature Group D (FGD) terminating access. The FCC determinations Thrifty Call seeks to rely on are applicable only to Feature Groups A and B (FGA, FGB) access. Sprint will respond to Thrifty Call's FCC filing separately. However, for purposes of this pleading, Sprint reasserts and

includes below, paragraphs 21-25 of the Complaint in response to the Petition for Declaratory Ruling arguments advanced¹ to discourage FPSC action:

[21]. In Thrifty Call's letter dated October 11, 1999, Thrifty Call's response includes several matters that are either inaccurate or false. The first reference that Thrifty Call makes is to Section 2.3.11.A.1.b of Sprint's FCC Tariff No.1. Thrifty Call asserts that Sprint uses the entry-exit surrogate ("EES") as a method of jurisdictional classification of traffic. Thrifty Call claims that the FCC's EES methodology prescribes that "every call for which the point of entry in a state other than that where the called station (as designated by the called station number) is situated is an interstate communication." Thrifty Call appears to be asserting that if they receive the call outside of the state of Florida and terminate it within the state of Florida it is an interstate call even though it originated within the state of Florida. As previously stated, the Sprint Florida Intrastate Access Tariff is clear that "the customer's specific network configuration shall not be considered" in determination of the jurisdiction of traffic.

[22.] In addition, Sprint notes that the section in the FCC tariff referenced by Thrifty Call deals with Feature Group A, Feature Group B, 500 Access Service and/or Toll Free Code (TFC) Access Service. The terminating access service ordered by and provided to Thrifty Call in Florida is Feature Group D service. Thrifty Call's citation to the FCC tariff is inaccurate and irrelevant. For Feature Group D access, the appropriate reference in Sprint's interstate Tariff F.C.C. No. 1 is found in Section 2.3.11.A.4.c, which states as follows:

For originating access minutes, the projected interstate percentage will be developed on a monthly basis when Feature Group C or Feature Group D Switched Access Service minutes are measured by dividing the measured interstate originating minutes (the minutes where the calling number is in one state and the called number is in

¹ In the Motion for Dismissal/Stay, Thrifty Call incorporated the arguments set forth in the Petition for Declaratory Ruling, Motion at 2.

another state) by the total originating minutes when the call detail is adequate to determine the appropriate jurisdiction.

For terminating access minutes, the data used by the Telephone Company to develop the projected interstate percentage for originating minutes will be used to develop projected interstate percentage for such terminating access minutes.

[Emphasis added]. Thus, contrary to Thrifty Call's assertions, the interstate tariff expressly supports the argument that this traffic is jurisdictionally intrastate.

[23.] More importantly, the Telecommunications Act of 1996 provides that the underlying premise of Thrifty Call's argument is invalid. At 47 U.S.C. § 153 (22) "Interstate Communications" is defined to exclude "wire or radio communications between points in the same State ... through any place outside thereof ...if such communication is regulated by a State commission." In its Declaratory Ruling in CC Docket No. 96-98, Adopted February 28, 1999, Released February 28, 1999, the FCC indicated as follows:

18. Having concluded that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, we now must determine whether that transmission constitutes interstate telecommunications. Section 2(a) of the Act grants the Commission jurisdiction over "all interstate and foreign communication by wire." Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." In a conventional circuit-switched network, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate.

[Emphasis added]. Contrary to Thrifty Call's assertions, the FCC has clearly indicated that this traffic is jurisdictionally intrastate. Origination of the call does not occur at Thrifty Call's point of interconnection.

[24.] In addition, Sprint's Florida Intrastate Access Service Tariff, the Florida Public Service Commission and Florida Law all unequivocally

demonstrate jurisdiction of the subject calls and active regulation of the terms and conditions of intrastate terminating access. The Florida Commission clearly has authority over the services at issue as set forth in Sprint's Intrastate Access Service Tariff, Section E2.3.11.A.1, which states as follows:

The intrastate usage is to be developed as though every call that originates within the same state as that in which the called station (as designated by the called station number) is situated is an intrastate communication and every call for which the point of origination is in a state other than that where the called station (as designated by the called number) is situated is an interstate call. For the purposes of jurisdictional reporting, origination shall be defined as the calling end user's initiation of the call. The customer's [IXC] specific network configuration shall not be considered.

[Emphasis added]. Simply put, a call that originates in Florida and terminates in Florida is an intrastate call regardless of how the call is ultimately transported.

[25.] The Florida Commission clearly possesses all regulatory authority over the traffic at issue since Sprint's Intrastate Access Service Tariff is lawfully filed and in force pursuant to Florida law. The Commission has ruled previously that traffic as defined in Sprint's intrastate tariff is jurisdictionally intrastate. See, *In re: An investigation into the statewide offering of access to the local network for the purpose of providing information services*, Docket No. 880423-TP; Order No. 21815, Florida Public Service Commission, 1989 Fla. PUC LEXIS 1341; 89-9 FPSC 7; 37, Issued September 5, 1989 ("[I]ntrastate access is defined as access provided by the LEC in association with a call which originates and terminates within the same state.") Furthermore, the Florida Commission has filed an *amicus* Memorandum with the FCC in a similar dispute over the misstatement of PIU factors expressing the Florida Commission's strong assertion of jurisdiction over intrastate traffic as defined in Sprint's tariffs. *In the Matter of LDDS, Inc. v. United Telephone of Florida*. (See, Exhibit 9). Based on the overwhelming legal precedent,

Thrifty Call's suggestion that the traffic is interstate, is per se unreasonable and without merit, as a matter of law.

5. Clearly, application of an EES-based PIU methodology to FGD traffic where the originating and terminating end users are in Florida was not the intention of the FCC. Thrifty Call attempts to distract the FPSC by reference in its Petition for Declaratory Ruling at page 3 by inadequately citing the FCC's 1989 "EES Order" order where it appears to discuss -- out-of-context -- the Joint Board's recommendation to use an EES-based PIU for access billing purposes. By its presentation of the excerpt of the order, Thrifty Call would have the FPSC believe that the Board recommended, and the FCC adopted, an EES methodology for billing of premium access like FGD. Thrifty Call cites only the "comment" section of the order. In the "discussion" section of the order, where the actual holding is contained, the FCC made it abundantly clear that there is no EES-based PIU requirement except for FGA and FGB access. See, *In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, CC Docket No. 85-124, FEDERAL COMMUNICATIONS COMMISSION, 4 FCC Rcd 8448; 1989 FCC LEXIS 2895, where the FCC states, in adopting the Joint Board recommendation on EES for access billing:

14. We also endorse the Joint Board's conclusion that the EES method should be used to allocate the FGA and FGB traffic not only for cost separations purposes, but also for interstate access charge billing purposes. n31 As we concluded in the EES Order and the Supplemental NPRM, the method of determining jurisdictional allocation of FGA and FGB access minutes can affect both revenue recovery and the assignment of costs of those services. Thus, we agree with the Joint Board that that any comprehensive and permanent resolution of the measurement issue must include consideration of both jurisdictional costs and revenues.

[Emphasis added]. Obviously, as the style of the Docket and the holding of the FCC indicate, the application of the EES methodology is limited to FGA and FGB access. Thus, Thrifty Call's invocation of FCC orders relating to EES and FGA/FGB are inadequate to raise a colorable claim of relevance, much less "exclusive FCC jurisdiction."

6. In addition to demonstrating the lack of a "colorable claim" of exclusive jurisdiction regarding the PIU determination for FGD access service, Sprint submitted extensive documentation appended to the Complaint conclusively showing that the traffic in question was overwhelmingly intrastate before Thrifty Call attempted to "launder" it via the inapplicable EES-based PIU methodology. See Complaint Exhibits 3 and 4. In addition, test calls confirm the originating and terminating points of the call lie entirely within the State of Florida. See Complaint Exhibit 5 (Affidavit of Mary Kight). Concurrent with this Response, Sprint further submits as Attachment I the Affidavit of Cindy Heiman demonstrating that only FGD or special access was ordered by Thrifty Call during 1998 and 1999.² What is significant to note is that no FGA or FGB access was ordered by Thrifty Call. In fact nothing filed to date by Thrifty Call even suggests that any FGA or FGB traffic was terminated to Sprint. The FPSC should deny Thrifty Call's motion on the basis that no legal or factual predicate for FCC preemption exists or has even been suggested by the FCC.

B. The Commission Should Reject Thrifty Call's Request for Deference Under the Bryson Case

7. Thrifty Call also advances a misguided assertion that the case of Florida Public Service Commission v. Bryson, 569 So. 2d 1253 (Fla. 1990), suggests that the FPSC defer to the FCC and abdicate its jurisdiction in favor of Thrifty Call's "colorable claim of exclusive jurisdiction" advanced on behalf of the FCC. This advice to the FPSC is wholly misplaced

8. In the Bryson case the FPSC itself sought a writ of prohibition to enjoin a circuit court from acting in a rate setting mode – an area within the exclusive jurisdiction of the FPSC. In finding for the Commission, the court held that the circuit court lacked jurisdiction to act at all. No similarity exists between the instant situation and the Bryson case. As shown *supra*, no FCC preemption exists via mandated use of an EES-based PIU methodology since it is inapplicable to FGD access billing. Consequently, the lack of an FCC expression of preemption removes the very cornerstone for application of the Bryson concept advanced by

² Due to logistical problems a facsimile copy of the affidavit is being submitted. The original will be submitted as soon as received in Florida.

Thrifty Call. In addition, the Bryson case simply does not apply to a question of concurrent, cooperative or co-equal Federal/State regulatory activity or jurisdiction. Furthermore, there the "offended" adjudicator (the FPSC) actually sought to affirmatively preserve its jurisdiction. Here, the FCC has not spoken on the issue except by its silence. Additionally, Federal law expressly recognizes the clear jurisdiction of the Florida Commission in matters where the calls originate and terminate in the state of Florida. See, 47 U.S.C. § 153 (22). For these reasons, Sprint respectfully submits that the Bryson case has no bearing on this matter.

9. Sprint has filed a Complaint stating a cause of action and a very serious violation of its tariff. The Florida Public Service Commission has no reason to delay or defer to the FCC in this matter, especially where the FCC has never even suggested that preemption exist. Delay is costly to Sprint, the Florida Public Service Commission and only aids Thrifty Call in avoiding judgement.

10. Sprint respectfully urges that the Commission deny Thrifty Call's Motion and act expeditiously to grant the relief requested in Sprint's Complaint.

RESPECTFULLY SUBMITTED this 24th day of January 2000.



Charles J. Rehwinkel
Susan Masterton
P.O. Box 2214
MC: FLTLHO0107
Tallahassee, Florida 32316-2214

ATTORNEYS FOR SPRINT

ATTACHMENT I

AFFIDAVIT

STATE OF KANSAS

COUNTY OF JOHNSON

I, Cindy Heiman based on information and belief, state and allege the following:

I am the Group Manager for the MCIWorldcom Account and have prior experience in the Carrier Systems group as Manager for the Access Request Management System (ARMS), which is the operational support system used to process the Access Service Requests (ASR) from our access customers, systems development and the Customer Access Support System (CASS), which is the Sprint LTD operational support system used to bill access services, and ARMS production support staff.

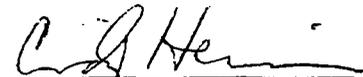
I was asked to ascertain for the period of April 1998 through December 1999 what type(s) of service the IXC ThriftyCall was being billed by Sprint-Florida, Incorporated (Sprint LTD) and subsequently confirm what type of service ThriftyCall had ordered from Sprint LTD.

To ascertain the type of billing, a report was pulled from CASS. This report confirmed that in the state of Florida FGD service was the only switched access service being billed by (Sprint LTD) from April 1998 through December 1999.

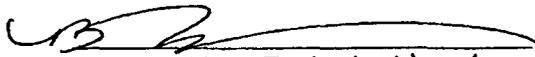
In addition, I, based on my knowledge of the billing systems and the operational processes, state that the only PIUs filed with Sprint LTD by ThriftyCall during this period of time for the state of Florida were for FGD access service.

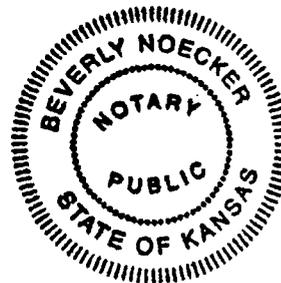
In January 2000, I was asked to determine whether ThriftyCall had ordered only FGD services during this period of time. A report was run from the ARMS system. This report confirmed that FGD was the only switched access service ordered by ThriftyCall during the period from April 1998 through December 1999. In addition, copies of these ASRs will be made available upon request.

Further affiant sayeth naught,


Cindy Heiman

Subscribed and sworn before me this 24th day of January 2000.


Notary Public Beverly Noecker
My Commission Expires on 12/28/02



CERTIFICATE OF SERVICE
DOCKET NO. 991751-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 24th day of January, 2000 to the following:

Thrifty Call
Messer Law Firm
Floyd Self
Post Office Box 1876
Tallahassee, Florida 32302

Florida Public Service Commission
Beth Keating, Esq.
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Danny E. Adams, Esq.
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036



Charles J. Rehwinkel