

Lisa S. Foshee
General Attorney

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

RECEIVED-FPSC
00 JUL 12 PM 4:23
RECORDS AND REPORTING

July 12, 2000

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

000690-TP

Re: New Docket – BellSouth Complaint re: the Practices of Intermedia Communications, Inc., Phone One, Inc., NTC, Inc. and National Telephone of Florida

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response and Opposition to Motion to Dismiss, or in the Alternative, Stay of Intermedia Communications, Inc., Phone One, Inc., NTC, Inc. and National Telephone of Florida which we ask that you file in the captioned docket.

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

Sincerely,

Lisa S. Foshee
Lisa S. Foshee (fw)

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

RECEIVED & FILED

Mur
FPSC-BUREAU OF RECORDS

APP _____
CAF _____
CMP *Simmons*
COM _____
CTR _____
ECR _____
LEG *2*
OPC _____
PAI _____
RGO *Uandiner*
SEC _____
SER _____
OTH _____

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by BellSouth Telecommunications,)	
Inc. Against Intermedia Communications, Inc., Phone One)	
Inc., NTC, Inc. and National Telephone of Florida)	Docket No. 000690-TP
Regarding Practices in Reporting of Percent Interstate)	Filed: July 12, 2000
Usage for Compensation For Jurisdictional)	
Access Services)	
)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE AND
OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY
OF INTERMEDIA COMMUNICATIONS, INC., PHONE ONE, INC., NTC, INC.
AND NATIONAL TELEPHONE OF FLORIDA**

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds and objects to the Motion to Dismiss Or, In The Alternative, To Stay, of Intermedia Communications, Inc, Phone One, Inc., NTC, Inc. and National Telephone of Florida (collectively "Intermedia"). Intermedia fails to present any grounds upon which the Commission should dismiss the Complaint, and consequently, BellSouth requests that the Commission deny the Motion and proceed with a scheduling order in this case.

DISCUSSION

Despite the puffery and rhetoric of Intermedia's Motion, the crux of its argument is that BellSouth's Complaint is improper because BellSouth somehow "failed to comply" with its intrastate access tariff by not conducting an audit of Intermedia's call data. (Motion, at 1-2). Intermedia's argument, however, is based on a mischaracterization of BellSouth's tariff. Section E2.3.14B(1) of BellSouth's tariff provides in relevant part as follows:

When an IC or End User provides a projected interstate usage set forth in A. preceding, or when a billing dispute arises or a regulatory commission questions the projected interstate percentage for *BellSouth SWA*, the Company may, by written request, require the IC or End User to provide

the data the IC or End User used to determine the projected interstate percentage. This written request will be considered the initiation of the audit.

Moreover, Section E2.3.14B(2) of the tariff provides in part that “for *BellSouth SWA* service, verification audits may be conducted no more frequently than once per year....”

The language of the tariff is clear that the audit is discretionary on the part of BellSouth. Contrary to Intermedia’s representation, the audit is not mandatory, nor is it in any way exclusive of other rights and remedies of BellSouth, including Commission action. The verification procedures, including the audit, were set forth in the tariff for BellSouth’s protection. It strains credulity to take the position that by creating a discretionary audit procedure, BellSouth somehow waived its right to pursue a claim for past and future claims under the tariff with the Commission. Not surprisingly, Intermedia does not, and indeed cannot, point to any language in the tariff that requires BellSouth to conduct an audit in lieu of filing a complaint with the Commission.

In an attempt to bolster its argument, Intermedia claims that because it contends that it was willing to undergo an audit, that fact somehow constitutes a waiver of BellSouth’s right to pursue its complaint. This simply is not the case. The tariff provides that BellSouth, at its option, may conduct an audit. Once BellSouth initiates an audit, the tariff provides that Intermedia must make certain information available. *See* Section E2.3.14B(1). The fact that Intermedia may or may not have agreed to expeditiously participate in an audit (a point on which the parties’ disagree) has no bearing on whether BellSouth has the right to pursue this complaint proceeding before the Commission.

Intermedia next contends that “BellSouth’s conclusion, on the basis of its own testing...does not conclusively establish anything nor does it absolve BellSouth of its

obligation to have an audit performed....” (Motion, at 2). First, Intermedia’s contention that BellSouth’s testing does “not conclusively establish anything” has no bearing on BellSouth’s right to file a complaint. In fact, the entire purpose of a hearing is to allow the Commission to assess the factual allegations underlying BellSouth’s complaint; the fact that Intermedia may disagree with the factual assertions contained therein is not grounds for the Commission to dismiss the complaint. A complaint simply is a means of setting forth the allegations upon which the dispute between the parties rests; it is not a motion for summary judgment and is not held to such a standard. Intermedia’s legal analysis on this point is flawed.

Moreover, the point that Intermedia attempts to gloss over is that BellSouth no longer needs an audit because BellSouth conducted the test calls outlined in its Complaint as the means to substantiate its claim prior to filing the Complaint. The test call data is as good as, if not better than, an audit. Thus, the time for an audit has passed and BellSouth accordingly withdrew its audit request on March 22, 2000. Intermedia’s contention that “we do not know if there is a controversy to be resolved by way of a complaint,” (Motion, at 3), simply ignores the test data described in the Complaint. Whether the Commission finds the test data persuasive is a question for the Commission to resolve after a hearing, not grounds for the Commission to dismiss the Complaint.

Intermedia’s so-called “willingness” to undergo an audit, upon which Intermedia relies so heavily in its Motion, was unacceptable to BellSouth because BellSouth seeks relief for Intermedia’s past tariff violations. A mere request for an audit by BellSouth does not provide the party being audited with immunity from prior intentional misreporting of access traffic. Intermedia’s claims that BellSouth is acting “arrogantly”

by refusing to comply with its own tariffs presupposes that BellSouth is not complying with the tariff. As set forth above, this simply is not the case.

As Intermedia referenced in its Motion, Thrifty Call, Inc. filed a similar motion with this Commission and the North Carolina Utilities Commission to dismiss or stay the proceeding against it on the grounds that BellSouth had failed to comply with its tariff. While this Commission has not ruled on Thrifty Call's Motion, the North Carolina Commission denied the motion and set the matter for a hearing. BellSouth has attached a copy of the North Carolina Commission's Order as Exhibit A hereto.

Finally, Intermedia claims that it is "greatly disturbed" by BellSouth's alleged failure to protect Intermedia's so-called confidential information in its Complaint. Certainly BellSouth takes very seriously its obligation to maintain the confidentiality of the proprietary information of itself and of its customers. In this case, however, BellSouth has no idea to what confidential information Intermedia is referring. Moreover, Intermedia has not identified any information it believes needs to be protected. This matter appears to be one that the parties could resolve had BellSouth been notified of Intermedia's concerns. BellSouth will be more than willing to work with counsel for Intermedia to ensure that all filings are made with appropriate confidential designations. BellSouth cannot, however, make a blanket agreement to make every filing in this case a confidential filing pursuant to Rule 25.006, Florida Administrative Code, as Intermedia apparently seeks.¹

¹ Although Intermedia cites Rule 25.22.001 in its Motion, BellSouth believes it is referring to the rule dealing with confidential information, Rule 25.22.006.

CONCLUSION

BellSouth respectfully requests that the Commission deny Intermedia's Motion. First, BellSouth is in full compliance with its tariff. The audit provision in the tariff is discretionary, not mandatory, and in no way limits BellSouth's right to pursue relief for tariff violations at the Commission. Second, BellSouth did not need an audit to substantiate its Complaint. The test calls it performed, all of which are described in the Complaint, constitute a more than adequate factual predicate for the Complaint. For these reasons, BellSouth requests that the Motion be denied.

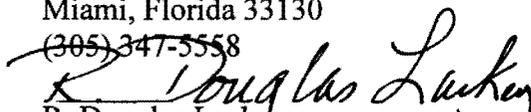
This 12th day of July, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



(Att)

NANCY B. WHITE
Museum Tower
150 West Flagler Street
Suite 1910
Miami, Florida 33130
(305) 347-5558



(Att)

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

EXHIBIT A

BellSouth requested that TCI be found to have intentionally and unlawfully reported traffic as interstate rather than intrastate and that as a result BellSouth has suffered financial harm; that TCI be required to comply with BellSouth's request for an audit to enable BellSouth to accurately calculate its damages; and that such other relief as is appropriate be granted.

On May 15, 2000, an Order Serving Complaint was issued, directing TCI to reply by June 5, 2000.

TCI Response

On June 5, 2000, TCI filed a Motion To Dismiss, Or, In The Alternative, To Stay. TCI maintained that BellSouth's Complaint is improper and premature because BellSouth has failed to comply with its own intrastate access tariff which expressly addresses this situation. Specifically, Section E2.3.14B of that tariff provides for audits to be conducted in disputes such as this and sets out procedures to be followed. TCI has never resisted BellSouth's request for an audit and has even recommended a proposed auditor; but BellSouth has not taken any action in response. Instead, BellSouth had demanded payment from TCI without an audit and outside of the tariff's procedures.

TCI also disputed BellSouth's claim to continuing harm. TCI said that it is not currently sending traffic to BellSouth and has not done so since January, even to the extent of disconnecting all of its feature group facilities with BellSouth by April 7, 2000.

Until the tariff procedures are fulfilled, a complaint proceeding is a waste of resources. If it is appropriate not to dismiss the Complaint, TCI alternatively requested that the Complaint be stayed until such time as an audit pursuant to BellSouth's North Carolina Intrastate Tariff has been conducted.

BellSouth Reply

On June 21, 2000, BellSouth filed a Reply And Opposition To Thrifty Call's Motion To Dismiss Or Stay. BellSouth identified the crux of TCI's argument as being that BellSouth had failed to comply with its intrastate access tariff by not conducting an audit of TCI's call data. BellSouth stated that the provision referred to was permissive, not mandatory:

When an IC [or End User] provides a projected interstate usage set forth in A. preceding, or when a billing dispute arises or a regulatory commission questions the projected interstate percentage for BellSouth SWA, the Company may, by written request, require the IC [or End User] to provide the data the IC [or End User] used to determine the projected interstate percentage. This written request will be considered the initiation of the audit. (Tariff Section E2.3.14B(1)) (Emphasis added).

Besides being permissive, this provision is in no way exclusive of other rights and remedies of BellSouth including Commission action. Moreover, the fact that TCI is now willing to undergo an audit in no way constitutes a waiver of BellSouth's right to pursue its complaint.

Indeed, in the absence of an audit, there is ample evidence for BellSouth to proceed with its complaint on the basis of the test calls it conducted as a means of substantiating its claim prior to filing the complaint. There is in fact no need for an audit at this point, and this is why BellSouth withdrew its audit request on April 7, 2000. TCI, it should be noted, also wants to limit the audit to adjusting the PIU on a going-forward basis, but the greater question is one of past violations. BellSouth is also concerned that, while TCI may not be currently passing traffic, it may do so tomorrow and, therefore, potential harm to BellSouth continues to exist.

WHEREUPON, the Chair reaches the following

CONCLUSIONS

After careful consideration, the Chair concludes that TCI's Motion To Dismiss, Or, In The Alternative, To Stay should be denied for the reasons as generally set out by BellSouth. As BellSouth has pointed out, the audit provision in its tariff is permissive, not mandatory, and is not in derogation of any other rights that BellSouth has. Accordingly, the Chair concludes that a hearing be set in this matter.

IT IS, THEREFORE, ORDERED as follows:

1. That TCI's Motion to Dismiss, or, in the Alternative to Stay, be dismissed.
2. That a hearing be scheduling on this matter beginning on Tuesday, September 19, 2000, at 9:30 a.m., in Commission Hearing Room 2115, 430 North Salisbury Street, Raleigh, North Carolina.
3. That BellSouth prefile testimony by no later than August 18, 2000.

4. That TCI prefile testimony by no later than September 1, 2000.
5. That BellSouth prefile rebuttal testimony by no later than September 8, 2000.

ISSUED BY ORDER OF THE CHAIR.

This the 23rd day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Cynthia S. Trinks

Cynthia S. Trinks, Deputy Clerk

mz062300.02

**CERTIFICATE OF SERVICE
Docket No. 000690-TP**

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

U.S. Mail this 12th day of July, 2000 to the following:

Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Tel. No. (202) 955-9600
Attys. for Intermedia, Phone One,
NTC and National Tel.

Scott Sapperstein
Senior Policy Counsel
Intermedia Communications, Inc.
3625 Queen Palm Drive
Tampa, FL 33619
Tel. No. (813) 829-0011
Fax. No. (813) 829-4923

Lisa S. Foshee

Patrick Knight Wiggins
Charles J. Pellegrini
Wiggins & Villacorta, P.A.
2145 Delta Boulevard
Suite 200
Tallahassee, FL 32303
Tel. No. (850) 385-6007
Fax. No. (850) 385-6008

Floyd R. Self
Messer, Caparello & Self, P.A.
215 South Monroe Street, Suite 701
P.O. Box 1876
Tallahassee, FL 32302-1876
Tel. No. (850) 222-0720
fself@lawfla.com
Attys. for Intermedia, Phone One,
NTC and National Tel.

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