



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 3, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAKER)

FROM: DIVISION OF LEGAL SERVICES (VACCARO) BK
 DIVISION OF REGULATORY OVERSIGHT (VANDIVER) RP
 DIVISION OF COMPETITIVE SERVICES (SIMMONS) SAS

RE: DOCKET NO. 000475-TP - COMPLAINT BY BELLSOUTH TELECOMMUNICATIONS, INC. AGAINST THRIFTY CALL, INC. REGARDING PRACTICES IN THE REPORTING OF PERCENT INTERSTATE USAGE FOR COMPENSATION FOR JURISDICTIONAL ACCESS SERVICES.

AGENDA: AUGUST 15, 2000 - REGULAR AGENDA - MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY - PARTIES MAY PARTICIPATE.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: REVISED PAGES 2--5

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CASE BACKGROUND

On April 21, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a complaint against Thrifty Call, Inc. (Thrifty Call). BellSouth alleges that Thrifty Call is intentionally and unlawfully reporting erroneous Percent Interstate Usage (PIU) factors to BellSouth in violation of BellSouth's Intrastate Access Tariff and the rules and regulations established by the Commission. BellSouth alleges that erroneous PIUs have resulted in the under reporting of intrastate access terminating minutes to BellSouth, causing BellSouth financial harm. BellSouth has requested that the Commission take all action appropriate to protect the company from further financial harm.

On May 16, 2000, Thrifty Call timely filed a Motion to Dismiss or, in the Alternative, to Stay BellSouth's complaint. On May 30,

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2000, BellSouth timely filed a Response and Opposition to Thrifty Call's Motion to Dismiss or Stay.

On June 26, 2000, BellSouth filed a Motion for Leave to File Supplemental Authority in support of its opposition to Thrifty Call's motion to dismiss or stay. On July 10, 2000, Thrifty Call filed its Response and Opposition to BellSouth's Motion for Leave to File Supplemental Authority. This recommendation addresses each party's motion. Staff's original recommendation was deferred from the August 1, 2000 Agenda Conference. The revisions to the recommendation are shaded.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion for Leave to File Supplemental Authority?

RECOMMENDATION: Yes. The Commission should grant BellSouth Telecommunications, Inc.'s Motion for Leave to File Supplemental Authority. (VACCARO)

STAFF ANALYSIS: On June 26, 2000, BellSouth filed a Motion for Leave to File Supplemental Authority in support of its opposition to Thrifty Call's motion to dismiss or stay. BellSouth seeks to submit an order of the North Carolina Utilities Commission (NCUC) which denied Thrifty Call's motion to dismiss a BellSouth complaint for misreported PIU in North Carolina.

On July 10, 2000, Thrifty Call filed its Response and Opposition to BellSouth's Motion for Leave to File Supplemental Authority. Thrifty Call asserts the following in support of its opposition to BellSouth's motion:

1. The Commission has no rules or procedures for the filing of supplemental authorities. See Order No. PSC-99-1463-FOF-SU (July 27, 1999); Order No. PSC-97-0283-FOF-WS (March 12, 1997); Order No. PSC-96-1527-FOF-WS (December 16, 1996). The Commission has noted, however, that, in accord with Rule 9.225, Florida Rules of Appellate Procedure, it has the authority to consider supplemental authority. Id.;

2. The Commission has stated that "a notice of supplemental authority drawing our attention to authority newly discovered and devoid of argument would be properly received." Order No. PSC-97-0283-FOF-WS (citing In Re: Petition for Limited Proceeding to Implement Conservation Plan in Seminole County by Sanlando Utilities Corporation Order No. PSC-94-0987-FOF-WS (August 15, 1994)). Similarly, in Order No. PSC-96-1527-FOF-WS (December 16, 1996), the Commission noted that it may be proper to consider supplemental authority if a party alleges that some point of law has been overlooked during the course of the proceedings. BellSouth has submitted the NCUC order purely for the sake of argument and, therefore, the order does not meet the Commission's test for receiving supplemental authority;

3. Inherent in the notion of supplemental authority is the idea that the referenced document contains a statement of governing law. An NCUC order interpreting North Carolina laws or tariffs is not dispositive, let alone relevant, to the Commission's investigation of Florida Law and BellSouth's Florida tariff.

Analysis

Rule 9.225, Florida Rules of Appellate Procedure states:

Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument. (Emphasis added.)

As indicated by Thrifty Call, the Commission has noted that, in accord with this rule, it has the authority to consider supplemental authority. BellSouth states in its motion that Thrifty Call's motion to dismiss in North Carolina is identical to the motion to dismiss filed in Florida, and that the NCUC denied the motion to dismiss and set BellSouth's complaint for hearing. Staff believes that BellSouth's motion merely calls this matter to the Commission's attention. It does not appear to contain argument.

In ruling on this issue in the past, the Commission has focused upon whether the notice itself contained argument. In Docket No. 930256-WS, In Re: Petition for Limited Proceeding to Implement Conservation Plan in Seminole County by Sanlando Utilities Corporation, the utility called to the Commission's attention in a notice of supplemental authority, newly-enacted Section 367.0817, Florida Statutes. In its notice Sanlando argued that because the statute addressed the objections raised to the Commission's order approving the utility's conservation plan, they should be dismissed. By Order No. PSC-94-0987-FOF-WS, the Commission rejected the notice as argumentative.

In Docket No. 950758-WS, In Re: Petition for Approval of Transfer of Facilities of Harbor Utilities Company, Inc. to Bonita Springs Utilities and Cancellation of Certificates Nos. 272-W and 215-S in Lee County, Bonita Springs Utilities (BSU) sought consideration of an opinion of the Second Court of Appeal in State of Florida Department of Environmental Protection v. Harbor Utilities Co., Inc., 21 Fla.L.Weekly D2664. By that order, the Second DCA reversed the trial court's order dismissing Harbor Utilities Company, Inc.'s president as an individual in a DEP administrative enforcement action taken against Harbor and its president individually. In its notice BSU argued that the court opinion was additional support for its contention that the transfer of Harbor to BSU was in the public interest and that the objecting Harbor customers' recourse was not against BSU, but against Harbor and its president. By Order No. PSC-97-0283-FOF-WS, issued March 12, 1997, the Commission denied consideration of the court opinion stating at page 5 that BSU had submitted the court opinion for the purpose of argument.

Consistent with Rule 9.225, Florida Rules of Appellate Procedure, and the Commission orders cited by Thrifty Call, BellSouth's motion should be approved, because BellSouth has merely called to the Commission's attention a ruling made by the NCUC on an issue similar to the one contained in this docket.

Further, Staff disagrees with Thrifty Call's assertion that the Commission should deny BellSouth's motion because the NCUC order is not dispositive or relevant to the current proceeding. The NCUC order is relevant to the extent that it deals with a motion to dismiss similar to the one filed in this proceeding. Although the NCUC order is not dispositive in this proceeding, the Commission has the discretion to consider that order and to give it the weight it deserves. For example, in Docket No. 991854-TP, In Re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia

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Communications, Inc., Intermedia Telecommunications, Inc. (Intermedia) filed motions to submit arbitration decisions of the NCUC and Georgia Public Service Commission (GPSC) as supplemental authorities subsequent to the filing of post-hearing briefs. Intermedia stated that the NCUC and GPSC held in favor of several issues identical to those in Docket No. 991854-TP. During the August 1, 2000 Agenda Conference, the Commission granted Intermedia's motions giving the NCUC and GPSC orders the weight they deserved. Based upon the foregoing, staff recommends that the Commission grant BellSouth's Motion for Leave to File Supplemental Authority.

ISSUE 2: Should the Commission grant Thrifty Call, Inc.'s Motion to Dismiss or, in the Alternative, to Stay?

RECOMMENDATION: No. The Commission should deny Thrifty Call, Inc.'s Motion to Dismiss or, in the Alternative, to Stay.
(VACCARO, SIMMONS)

STAFF ANALYSIS: On May 16, 2000, Thrifty Call timely filed a Motion to Dismiss or, in the Alternative, to Stay BellSouth's complaint. On May 30, 2000, BellSouth timely filed a Response and Opposition to Thrifty Call's Motion to Dismiss or Stay.

Motion to Dismiss

Thrifty Call asserts the following in support of its motion to dismiss:

1. BellSouth is required by law to comply with the terms of its own tariff and should be required to demonstrate such compliance before filing any action against Thrifty Call. See Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983); Louisville & Nashville Railroad v. Speed-Parker, Inc., 137 So. 724 (Fla. 1931);
2. BellSouth has failed to comply with its own intrastate tariff. Section E2.3.14(B) of BellSouth's Access Tariff specifically provides for audits to be conducted in disputes such as this, and specifies the procedures to be followed in such cases. Thrifty Call has never disputed BellSouth's right to conduct an audit, has expressed willingness to agree to an audit, and had recommended a proposed auditor. In response, BellSouth refused to approve an auditor, demanded payment from Thrifty Call and filed this complaint;
3. Without an audit, there is no basis for BellSouth to make the outrageous demands and false assertions contained in its complaint. Until such time, it is unknown if there is a controversy to be resolved by way of a complaint;
4. BellSouth's complaint is misleading and misstates the facts. For example, BellSouth asserts that it has been harmed and will continue to be harmed unless the Commission acts. Thrifty Call has sent no traffic to BellSouth since January 2000. Thrifty Call disconnected

its feature group facilities with BellSouth by April 7, 2000. Therefore, there is no continuing or growing harm to BellSouth.

Response

BellSouth asserts the following in support of its opposition to Thrifty Call's motion to dismiss:

1. Section E2.3.14(B)(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. (Emphasis added by BellSouth)

The language of the tariff is clear that the audit is discretionary on the part of BellSouth. The audit is not mandatory, nor is it exclusive of other rights and remedies of BellSouth, including Commission action;

2. BellSouth conducted test calls. The test call data is as good as, if not better than, an audit. Further, Thrifty Call's so called "acquiescence" to the audit was unacceptable, because Thrifty Call wanted to limit it to adjusting PIU on an ongoing basis, which would provide no relief to BellSouth for Thrifty Call's past tariff violations;

3. The fact that Thrifty Call may disagree with the factual assertions contained in BellSouth's complaint, i.e., "BellSouth's outrageous demands and false assertions," is not grounds for dismissal of the complaint;

4. In regard to Thrifty Call's assertion that there is no ongoing harm to BellSouth, the fact that Thrifty Call is not currently passing traffic does not mean that it

cannot start passing traffic again in the future, and misrepresenting the PIU on the traffic.

Analysis

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

Thrifty Call argues that BellSouth has failed to comply with its own intrastate tariff by refusing to agree to an audit of Thrifty Call's PIU. The crux of Thrifty Call's motion to dismiss is that absent an audit there is no basis for BellSouth's allegations; therefore, it cannot be determined if a controversy exists. Nevertheless, under Varnes, BellSouth's allegations must be assumed to be true for the purpose of making a determination on Thrifty Call's motion to dismiss. BellSouth has alleged that Thrifty Call has overstated its terminating PIU, thereby causing BellSouth financial injury. Under Varnes, BellSouth is only required to state a cause of action for which relief can be granted; it is not required to prove the ultimate issues of fact. Thrifty Call's motion to dismiss goes beyond BellSouth's complaint to the ultimate issues of fact. Therefore, staff believes that Thrifty Call's motion to dismiss should be denied on this ground.

Thrifty Call also argues that there is no continuing or growing harm to BellSouth. Again, Thrifty Call's assertion goes beyond BellSouth's complaint to the ultimate issues of fact. Based on Varnes, staff believes that Thrifty Call's motion to dismiss should also be denied on this ground.

Motion to Stay

In the event that the Commission denies Thrifty Call's motion to dismiss, it alternatively requests that the complaint be stayed until such time as an audit pursuant to BellSouth's Florida Intrastate Tariff has been conducted. BellSouth opposes Thrifty Call's motion to stay based on the grounds set forth in its opposition to Thrifty Call's motion to dismiss.

BellSouth contacted Thrifty Call by letter on January 18, 2000, requesting the data used by Thrifty Call to determine PIU. BellSouth indicated that the data request would be considered the initiation of an audit pursuant to its tariff. BellSouth also requested payment by Thrifty Call for the misreported traffic. BellSouth also mailed letters to Thrifty Call on January 31, 2000 and February 1, 2000. Thrifty Call responded by letter on February 10, 2000, indicating that it was willing to participate with an audit; however, it stated that it was unwilling to make any payments at the present. On March 22, 2000, Thrifty Call mailed another letter to BellSouth indicating that it was still willing to proceed with an audit. Apparently, there was concern of a potential conflict of interest, because the auditor had performed prior work for BellSouth. Thrifty Call also expressed concern that BellSouth was considering a complaint before the Commission. BellSouth filed its complaint with the Commission on April 21, 2000, alleging that Thrifty Call had purported to agree to an audit, but under unreasonable terms.

Staff has reviewed the pertinent provisions of BellSouth's Intrastate Tariff. Under Section E2.3.14(B)(1) of BellSouth's tariff, Thrifty Call was required to supply the data used to determine the PIU to an independent auditor within 30 days of BellSouth's request. In addition, this section of the tariff provides the following:

Where attempts to obtain the appropriate data from the IC or End User beyond the 30 day time limit have failed, the Company may provide such documentation to the Commission as an indication of the IC or End User being in violation of this Tariff.

To the best of staff's knowledge, Thrifty Call did not provide any of the required data, due apparently to the parties' disagreement over the auditor/terms of the audit. This disagreement, however, cannot be used as justification for failing to provide the required data. In particular, Section E2.3.14(B)(4) provides the following:

Where an independent auditor cannot be agreed upon within 30 days the IC or End User shall supply the data to the Joint LEC Audit Committee's auditor. If the IC or End User does not comply with the 30 day time frame, the FPSC shall be notified and provided with all documentation substantiating requests made by the Company.

Staff believes that BellSouth has acted in accordance with its tariff by filing this complaint. Therefore, staff believes that it

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is appropriate for the Commission to proceed with this docket. If necessary, an audit can be undertaken by staff within this proceeding.

Based on the foregoing, staff recommends that Thrifty Call, Inc.'s Motion to Dismiss or, in the Alternative, to Stay should be denied.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 2, this docket should remain open pending resolution of BellSouth's complaint. (VACCARO)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 2, this docket should remain open pending resolution of BellSouth's complaint.