



# Public Service Commission

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**DATE:** SEPTEMBER 14, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF LEGAL SERVICES (VACCARO, DANDELAKÉ)  
DIVISION OF COMPETITIVE SERVICES (AUDU)  
DIVISION OF REGULATORY OVERSIGHT (VANDIVER)

**RE:** DOCKET NO. 000690-TP - COMPLAINT BY BELLSOUTH TELECOMMUNICATIONS, INC. AGAINST INTERMEDIA COMMUNICATIONS, INC., PHONE ONE, INC., NTC, INC., AND NATIONAL TELEPHONE OF FLORIDA REGARDING THE REPORTING OF PERCENT INTERSTATE USAGE FOR COMPENSATION FOR JURISDICTIONAL ACCESS SERVICES.

**AGENDA:** 09/26/00 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\000690.RCM

### CASE BACKGROUND

On June 5, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a complaint against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc. and National Telephone of Florida (collectively Intermedia). BellSouth alleges that Intermedia is and has been 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 it from further financial harm.

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DOCKET NO. 000690-  
DATE: September 14, 2000

On June 30, 2000, Intermedia timely filed a Motion to Dismiss or, in the Alternative, to Stay BellSouth's complaint. On July 12, 2000, BellSouth timely filed a Response and Opposition to Intermedia's Motion to Dismiss or Stay. This recommendation addresses Intermedia's motion.

#### **JURISDICTION**

Pursuant to Section 364.058, Florida Statutes, the Commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction. Pursuant to Section 364.07(2), Florida Statutes, the Commission is authorized to review contracts for joint provision of intrastate interexchange service, and is authorized to adjudicate disputes of telecommunications companies regarding such contracts or the enforcement thereof. Therefore, the Commission is authorized to proceed in this matter.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Intermedia's Motion to Dismiss or, in the Alternative, to Stay?

**RECOMMENDATION:** No. The Commission should deny Intermedia's Motion to Dismiss or, in the Alternative, to Stay. (VACCARO, AUDU)

**STAFF ANALYSIS:** On June 30, 2000, Intermedia timely filed a Motion to Dismiss or, in the Alternative, to Stay BellSouth's complaint. On July 12, 2000, BellSouth timely filed a Response and Opposition to Intermedia's Motion to Dismiss or Stay.

#### **Motion to Dismiss**

Intermedia 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 Intermedia. 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); Carter v. American Telephone & Telegraph Co., 365 F.2d 486 (5th Cir. 1966);

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. Further, Section E2.3.14(D)(1) of BellSouth's tariff provides that if BellSouth seeks to dispute the PIU, it must do so as the result of an audit. Intermedia has never disputed BellSouth's right to conduct an audit and has expressed willingness to cooperate with an audit. BellSouth's auditor contacted Intermedia. Intermedia indicated that it wished to negotiate the procedures of the pending audit. Instead of agreeing to negotiate those procedures, BellSouth notified Intermedia that it was suspending the audit. Subsequently, without further notice, BellSouth filed this complaint;

3. Until there is an audit, it is unknown if there is a controversy to be resolved by way of a complaint. BellSouth's conclusion, on the basis of its own testing [that Intermedia has misreported PIU], does not conclusively establish anything nor does it absolve BellSouth of its obligation to have an audit performed.

#### Response

BellSouth asserts the following in support of its opposition to Intermedia'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. Intermedia's willingness to undergo an audit does not constitute a waiver of BellSouth's right to pursue its complaint;

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

3. Intermedia's contention that BellSouth's testing does "not conclusively establish anything" has no bearing on BellSouth's right to file a complaint. The entire purpose of a hearing is to allow the Commission to assess the factual allegation underlying BellSouth's complaint; the fact that Intermedia may disagree with the factual assertions contained therein is not grounds for dismissal of the complaint.

### 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.

Intermedia argues that BellSouth has failed to comply with its own intrastate tariff by refusing to agree to an audit of Intermedia's PIU. The crux of Intermedia'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 Intermedia's motion to dismiss. BellSouth has alleged that Intermedia 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. Intermedia's motion to dismiss goes beyond BellSouth's complaint to the ultimate issues of fact. Therefore, staff believes that Intermedia's motion to dismiss should be denied.

Motion to Stay

In the event that the Commission denies Intermedia'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 Intermedia's motion to stay based on the grounds set forth in its opposition to Intermedia's motion to dismiss.

According to Intermedia, BellSouth's auditor forwarded to Intermedia the necessary paperwork to perform an audit on October 13, 1999. The auditor included a set of "agreed-upon procedures" for performing the audit. Intermedia indicated that it had not agreed to any procedures, was not aware of the procedures, and that it wished to negotiate with BellSouth regarding such procedures. Intermedia states that instead of agreeing to negotiate the procedures of the pending audit, BellSouth notified Intermedia on March 22, 2000 that it was suspending the audit and that it reserved the right to reinstate the audit at a later date. Subsequently, BellSouth filed its complaint. In its complaint, BellSouth states that it requested information from Intermedia to refute BellSouth's contention that Intermedia intentionally misreported its PIUs. BellSouth states that it requested the information by conference call on March 22, 2000 and by letter on March 24, 2000, April 10, 2000 and April 14, 2000. BellSouth states that Intermedia responded to the April 14 letter on May 19, 2000, denying BellSouth's claim; however, Intermedia did not provide any supporting documentation. Therefore, BellSouth asserts that it had no choice but to pursue this action before the Commission.

Staff has reviewed the pertinent provisions of BellSouth's Intrastate Tariff. Section E2.3.14(B)(1) does indicate that BellSouth "may" request from the IC or end user information regarding PIU, and the request will be considered the initiation of an audit. As BellSouth asserts, the word "may" does suggest that the audit is discretionary. On the other hand, Section E2.3.14(B)(4) of the tariff provides the following:

If a billing dispute arises or a regulatory commission questions the projected interstate percentage for

Dedicated Access Service, the Company will ask the IC or End User to provide the data the IC or End User uses to determine the projected interstate percentage. The IC or End User shall supply the data to an independent auditor within thirty days of the Company request. (Emphasis added.)

The words "will ask" lend support to Intermedia's assertion that an audit is mandatory. Given the apparently conflicting provisions of Sections E2.3.14(B)(1) and E2.3.14(B)(4), it is unclear whether an audit is required by BellSouth's tariff, and, thus, whether BellSouth has failed to abide by its tariff. Intermedia cites Section E2.3.14(D)(1) to support its contention that an audit is required. That section provides that "The Company will adjust the IC or End User's PIU based upon the audit results." Staff notes, however, that Section E2.3.14(D)(1) prescribes what BellSouth must do if, in fact, an audit has occurred, but does not specify that an audit must be conducted.

Staff also notes that Section E2.3.14(B)(1) of BellSouth's tariff required that Intermedia supply the data used to determine the PIU to BellSouth or 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, Intermedia did not provide any of the required data, due apparently to the parties' disagreement regarding what provisions would govern the audit. The tariff, however, does not provide that the IC or end user may withhold the requested information pending resolution of such a disagreement.

Regardless of whether or not BellSouth's tariff requires an audit, staff believes that it is unnecessary for the Commission to stay this proceeding. If necessary, an audit can be undertaken by staff. Staff notes that the Commission considered a similar motion filed by Thrifty Call, Inc. (Thrifty Call) to dismiss or stay a complaint filed by BellSouth for alleged misreported PIU by Thrifty Call. During the August 15, 2000, Agenda Conference, the Commission denied Thrifty Call's motion, finding it appropriate for the docket to proceed.

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

**ISSUE 2:** 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.