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November 21, 2001

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

**Re: FL Docket 000475-TP - Complaint Against Thrifty Call, Inc.
Regarding Practices in Reporting PIU for Compensation
For Jurisdictional Access Services**

Dear Mrs. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Direct Testimony of Mike Harper, which we ask that you file in the above-referenced matter.

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,


James Meza III (KA)

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

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CERTIFICATE OF SERVICE
Docket No. 000475-TP

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

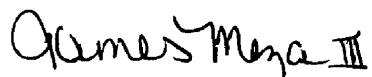
U. S. Mail this 21st day of November, 2001 to the following:

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James Meza III (KA)

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BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF MIKE HARPER

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 000475-TP

NOVEMBER 21, 2001

Q. PLEASE STATE YOUR NAME, COMPANY NAME AND ADDRESS.

A. My name is Mike Harper. I am employed by BellSouth Telecommunications, Inc. as Project Manager – Business Intelligence in the Interconnection Services Marketing Organization. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE SUMMARIZE YOUR BACKGROUND AND EXPERIENCE.

A. I have a Bachelors Degree in Physics and a Master of Business Administration from the University of Louisville in Louisville, Kentucky. I have over thirty years of experience in telecommunications. I was employed by South Central Bell in Louisville, Kentucky and Birmingham, Alabama until December 1983, holding positions in Outside Plant Engineering, Investment and Costs Engineering, and Bell-Independent Relations, among others. From January 1984 until June 1998, I was

1 employed by AT&T in the areas of Local Exchange Company (LEC)
2 relations, Regulatory Docket Management, and Switched Access. In my
3 current position in BellSouth, I oversee the systematic tracking of traffic
4 between other carriers and BellSouth in order to validate the correct
5 jurisdictional classification and billing of that traffic.

6

7 Q. HAVE YOU TESTIFIED PREVIOUSLY?

8

9 A. Yes. I have testified in proceedings before the Alabama, Kentucky,
10 Louisiana, and Mississippi Public Service Commissions, the North Carolina
11 Utilities Commission and the Tennessee Regulatory Authority.

12

13 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

14

15 A. The purpose of my testimony is to show how Thrifty Call misreported its
16 Terminating Percent Interstate Usage ("TPIU") factor to BellSouth in
17 violation of BellSouth's Florida Intrastate Access Tariff and the rules and
18 regulations established by the Florida Public Service Commission
19 ("Commission"). The misreported factors caused BellSouth financial harm
20 by allowing Thrifty Call to avoid payment of the proper, tariffed
21 terminating switched access rates, totaling over \$ 2.0 million dollars over the
22 twenty-eight month period of misreporting.

23

1 Further, Thrifty Call did not fulfill its obligations under BellSouth's
2 switched access tariff to ensure that the TPIU factor it reported was correct
3 and representative of the jurisdiction of the traffic it was sending to
4 BellSouth.

5
6 Thrifty Call apparently attempted to disguise the correct jurisdiction of the
7 traffic it sent to BellSouth by deleting the calling party information on the
8 call records sent to BellSouth.

9

10 **ISSUE A: The Commission's Jurisdiction**

11

12 Q. What is the Commission's jurisdiction in this matter?

13

14 A. Although I am not a lawyer, the Commission has jurisdiction in this matter
15 because it involves the enforcement of BellSouth's Intrastate Access Tariff
16 regarding Thrifty Call's misreporting of its TPIU factor. The FCC has
17 made it clear that the FCC regulates interstate communications while state
18 commissions regulate intrastate communications, which are solely at issue in
19 this proceeding. Additionally, I understand that various provisions of
20 Section 364, Florida Statutes, ~~authorizes~~authorize the Commission to resolve
21 this type of dispute. BellSouth will fully address this issue in its post-hearing
22 brief.

23

1 **ISSUE 1: Terms and Conditions of BellSouth's Tariff**

2 Q. WHAT TARIFF IS AT ISSUE IN THIS PROCEEDING?

3 A. BellSouth's Intrastate Access Tariff.

4

5 Q. ARE THERE ANY MANDATORY PROCEDURES EXPRESSLY
6 PROVIDED IN BELLSOUTH'S INTRASTATE ACCESS TARIFF
7 THAT WOULD REQUIRE BELLSOUTH TO SEEK AN AUDIT
8 PRIOR TO BRINGING AN ENFORCEMENT ACTION BEFORE
9 THE COMMISSION?

10 A. No. However, based on Thrifty-Call's prior arguments in this proceeding as
11 well as in the North Carolina proceeding (Docket No. P-447, SUB. 5),
12 wherein the North Carolina Utilities Commission ("NCUC") found that
13 Thrifty Call did in fact misreport the TPIU factor, which is the same issue in
14 this proceeding, BellSouth expects Thrifty Call to argue that it was required
15 to seek an audit before bringing an enforcement action.

16

17 Q. IS THRIFTY CALL CORRECT IN ITS PROBABLE
18 INTERPRETATION OF BELLSOUTH'S INTRASTATE ACCESS
19 TARIFF?

20 A. No. The audit process in BellSouth's Intrastate Access Tariff is discretionary
21 and not mandatory. Further, the tariff does not mandate the use of an audit
22 when there is a PIU dispute. Rather, the tariff gives BellSouth the right to

1 conduct an audit, if it so chooses. For instance, Section E2.3.14B(1) of the
2 tariff provides in relevant part:

3 When an IC [or End User] provides a projected
4 interstate usage set forth in A. proceeding, or when a
5 billing dispute arises or a regulatory commission
6 questions the projected interstate percentage for
7 BellSouth SWA, the Company may, by written
8 request, require the IC [or End User] to provide the
9 data the IC [or End User] used to determine the
10 projected interstate percentage. This written request
11 will be considered the initiation of the audit.

12
13 Moreover, Section E2.3.14B(2) of the tariff states in part that “for BellSouth
14 SWA service, verification audits may be conducted no more frequently than
15 once per year”

16
17 Q. HAS ANY OTHER STATE COMMISSION ADDRESSED THIS ISSUE?

18 A. Yes. The NCUC addressed this very same issue in Docket No. P-447, SUB
19 5. In that proceeding, the NCUC found that the audit provision in
20 BellSouth’s Intrastate Access Tariff was permissive, not mandatory and was
21 not in derogation of any other rights that BellSouth has. See Order Denying
22 Motion and Setting Hearing, Docket No. P-447, SUB 5, June 23, 2000,
23 attached hereto as Exhibit MH-1.

24
25 **ISSUE 3: BellSouth’s Compliance with its Tariff**

26

1 Q. Has BellSouth complied with the provisions in its Intrastate Access Tariff in
2 bringing a complaint proceeding against Thrifty Call for misreporting the
3 TPIU factor?

4 A. Yes.

5

6 **ISSUES 4 and 5: Has Thrifty Call Misreported its PIU to BellSouth? If so,**
7 **what amount does Thrifty Call Owe BellSouth?**

8

9

10 Q. WHY IS IT IMPORTANT TO DETERMINE THE JURISDICTION OF
11 CALLS?

12 A. BellSouth's tariffed access rates in Florida are higher than interstate tariffed
13 access rates. If calls are misreported as interstate, then a lower rate is applied,
14 lowering the access charge billing to the carrier and depriving BellSouth of
15 its rightful revenues. Moreover, revenues are not properly classified for
16 jurisdictional purposes when such misreporting by carriers takes place.

17

18 Q. WOULD YOU PLEASE EXPLAIN THE TPIU FACTOR AND HOW
19 IT IS USED TO BILL SWITCHED ACCESS CHARGES?

20

21 A. Yes. BellSouth's Carrier Access Billing System ("CABS") is the mechanism
22 used to bill switched access charges to other carriers such as Thrifty Call.
23 For each CABS billing cycle during the month, the total minutes of use from
24 a specific carrier that terminate to BellSouth's customers are multiplied by
25 the TPIU factor reported to BellSouth by the carrier. The minutes of use

1 resulting from that calculation are billed at the current interstate terminating
2 switched access rate. Any remaining minutes are then billed at the current
3 intrastate terminating switched access rate. Therefore, the TPIU factor has a
4 direct bearing on the level of switched access billing for a particular carrier.

5

6 Q. WHY HAS BELLSOUTH TRADITIONALLY RELIED ON TPIU
7 FACTORS PROVIDED BY OTHER CARRIERS?

8

9 A. Very simply, until very recently, BellSouth has not had the ability to
10 determine the jurisdiction of calls from other carriers that terminate on its
11 network. BellSouth can certainly assign jurisdiction to originating calls
12 destined for other locations and those calls are the basis for the TPIU factor
13 that BellSouth provides to the carriers. But BellSouth has not previously had
14 the ability to know the jurisdiction of a sufficient percentage of calls from
15 other carriers that is necessary to calculate a representative TPIU factor. As
16 a result, BellSouth's Access Tariffs allow a carrier to tell BellSouth what
17 percentage of the total minutes of use it sends to BellSouth are interstate in
18 jurisdiction— a process generally known as "self-reporting".

19

20 Q. MUST BELLSOUTH CONTINUE TO RELY ON CARRIER-
21 REPORTED TPIU FACTORS?

22

1 A. BellSouth now has the ability to calculate TPIU factors using the Agilent
2 Business Intelligence Module ("BIM"). This system captures Signaling
3 System 7 ("SS7") call detail records in sufficient quantity and quality to allow
4 BellSouth to calculate TPIU factors. Tariff language that allows BellSouth to
5 use the TPIU factors from BIM in place of carrier self-reported factors was
6 approved in Florida, as well as in the other BellSouth states and the FCC in
7 May of 2000. The equipment was not used in the analysis of Thrifty Call
8 traffic, however, since Thrifty Call had largely suspended operations across
9 the region before BIM was functional.

10

11 Q. WHAT SPECIFIC INDICATIONS CAUSED BELLSOUTH TO BEGIN
12 ITS INVESTIGATION INTO TPIU FACTORS IN FLORIDA?

13

14 A. BellSouth has been concerned for some time about trends in minutes-of-use
15 terminating to BellSouth from other carriers. Specifically, terminating
16 minutes-of-use were declining as a percentage of originating minutes-of-use.
17 Historically, the relationship between originating and terminating minutes-
18 of-use was relatively static. In addition, the overall number of minutes-of-use
19 has been declining. Some of the changes in the trends can be explained by
20 other events in the industry. A shift from switched access services to special
21 access services and the strong growth of one-rate-call-anywhere cellular
22 service plans are recognized as possible contributors to the shift in minutes.
23 However, it was also discovered that a significant portion of the shift in

1 minutes was due to misclassified traffic received from carriers. For example,
2 traffic handed to BellSouth as local traffic in one state was found to be, in
3 fact, interstate toll traffic. And, in states such as North Carolina and Florida
4 where there is a wide difference between interstate terminating access and
5 intrastate terminating access rates, certain carriers have been found to
6 misrepresent intrastate traffic as interstate traffic in order to pay a lower rate.

7

8 BellSouth recognizes that there is a significant financial incentive to
9 misreport the jurisdiction of traffic. If a carrier has a significant number of
10 minutes terminating to BellSouth, a subtle shift in the TPIU factor can
11 reduce a carrier's access payments by a significant amount. Equally
12 important is the motivation to leave a TPIU factor at its current level even
13 after discovering that the factor is in error.

14

15 As a result of the potentially high levels of BellSouth revenue at risk should
16 this misreporting continue, BellSouth embarked on an intense, concentrated
17 effort to find and correct misclassified traffic. Thrifty Call emerged as one of
18 the carriers that systematically was misclassifying traffic in BellSouth's nine-
19 state region

20

21 Q. WHAT CAUSED BELLSOUTH TO LOOK SPECIFICALLY AT
22 THRIFTY CALL AND WHAT STEPS DID BELLSOUTH

1 UNDERTAKE TO INVESTIGATE THE TRAFFIC IT WAS SENDING
2 TO BELLSOUTH?

3
4 A. First, Thrifty Call's minutes-of-use terminating to BellSouth in Florida
5 experienced a dramatic increase in early 1999, from little terminating traffic
6 in February 1999 to nearly 22 million minutes-of-use per month by June
7 1999. See MH-Exhibit 2, attached hereto. Particularly concerning was that
8 the increase was being billed primarily at interstate terminating access rates
9 due to Thrifty Call's reported TPIU factor of 98%. Thrifty Call's reported
10 TPIU factor had been approximately 98% since early 1996 and it was
11 unlikely that such a sudden increase in minutes would not exhibit a different
12 interstate percentage. Yet, Thrifty Call did not materially revise its TPIU
13 factor at any of its quarterly updates.

14
15 In addition, BellSouth had uncovered similar cases of misreported traffic in
16 other states involving Thrifty Call and its Competing Local Exchange
17 Company ("CLEC") subsidiary, Golden Harbor. In Georgia, Golden
18 Harbor was found to be terminating traffic to BellSouth as local when, in
19 fact, the traffic was largely interstate. In North Carolina, Thrifty call was
20 suspected of terminating intrastate traffic to BellSouth but classifying it as
21 interstate. The North Carolina case was heard before the NCUC in
22 December 2000. The Commission found that Thrifty Call was indeed
23 misclassifying intrastate traffic as interstate as demonstrated by Thrifty Call's

1 own switch records and ordered Thrifty Call to pay BellSouth the correct
2 access charges owed. See Order Ruling on Complaint, Docket No. P-447,
3 SUB 5, April 11, 2001, attached hereto as MH-3. In all such cases, Thrifty
4 Call and Golden Harbor realized a competitive advantage over other
5 similarly situated carriers by paying less than the correct terminating access
6 rates.

7
8 Q. WHAT SPECIFIC ANALYSIS WAS PERFORMED IN ORDER TO
9 ASCERTAIN THE CORRECT JURISDICTION OF TRAFFIC FROM
10 THRIFTY CALL AND OTHER INTEREXCHANGE CARRIERS IN
11 FLORIDA?

12
13 A. BellSouth has a test call system in place called the Mechanized AMA Test
14 and Validation (“MATV”) system. This system allows BellSouth to initiate
15 test calls remotely from any of BellSouth’s switching locations in the region
16 to any other point in the region.

17
18 In Florida, BellSouth initiated test calls within the state, e.g., intrastate calls.
19 Of the calls initiated, 171 calls involved Carrier ID Code (“CIC”) 0923,
20 which is Thrifty Call. In the majority of the cases involving Thrifty Call,
21 the calling party number, or ANI, had been stripped from the calling record.
22 The absence of the calling party number is significant because that data is
23 normally present in the call record unless some action is taken to remove or

1 change the number. The calling party number is a primary source of
2 information used to ascertain the jurisdiction of a call. Of those records that
3 could be attributed to Thrifty Call and contained ANI, the test calls
4 indicated that the calls were completed within Florida, or intrastate calls.
5 Due to the high number of calls without the calling party number, the tests
6 were not conclusive with respect to a specific percentage of interstate versus
7 intrastate calls. However, the findings did support further investigation of
8 Thrifty Call.

9
10 Q. WHAT OBLIGATIONS DO CARRIERS HAVE WITH RESPECT TO
11 THEIR REPORTING OF TPIU FACTORS TO BELLSOUTH?

12
13 A. Carrier self-reporting of the TPIU factor is described in BellSouth's Florida
14 Access Services Tariff, Section E2.3.14. The tariff is very specific about how
15 the carriers should calculate the TPIU factor and how often the factor should
16 be reported to BellSouth.

17
18 In Section E2.3.14 (A)1(a), the tariff defines calls that originate and terminate
19 within the same state as intrastate calls and defines those that originate in a
20 different state than where the called station is located as interstate calls. In
21 paragraph (b) of this section, the tariff provides a specific formula to be used
22 to calculate the TPIU factor.

23

1 Section E2.3.14, (A), 3 specifies that carriers will update their reported TPIU
2 factors quarterly and explain the time intervals for providing updated
3 factors.

4

5 Q. DID THRIFTY CALL FOLLOW THE ACCESS TARIFF PROVISIONS
6 WITH RESPECT TO UPDATING THEIR TPIU FACTORS?

7

8 A. No. The TPIU reported by Thrifty Call for its terminating traffic in Florida
9 has been represented to BellSouth as 98% for most of the time since January
10 19, 1996. And, although Thrifty Call submitted TPIU factors at nearly
11 every quarterly update point, the factor was not materially changed and
12 remains reported at 98% today, even though Thrifty Call ceased operations
13 in Florida. Additionally, while Thrifty Call elected to report its TPIU
14 factor by LATA, the TPIU factors for each LATA are 98% as well.

15

16 Yet, BellSouth test data indicates that the majority of traffic terminating to
17 BellSouth in Florida was intrastate traffic, not interstate. Further, in the
18 North Carolina case, Thrifty Call's own call detail records demonstrated
19 that essentially all of its traffic was intrastate in jurisdiction and not
20 interstate as Thrifty Call claimed. BellSouth will be seeking the same
21 information for Florida in this proceeding.

22

1 Q. HAVE YOU BEEN ABLE TO DETERMINE WHAT
2 METHODOLOGY WAS USED BY THRIFTY CALL TO ARRIVE AT
3 THEIR REPORTED 98% TPIU FACTOR.

4
5 A. No. In fact, Thrifty Call's responses to data requests in North Carolina
6 seem to be contradictory on this point.

7
8 In North Carolina, Thrifty Call provided a copy of a letter from Gary
9 Gibbs, Director of Provisioning and Planning for Thrifty Call, to Kim
10 Maul, Line Cost Supervisor of Thrifty Call. The letter is a description of the
11 methodology purportedly used by Thrifty Call to determine PIU factors.
12 Ironically, had Thrifty Call used the methodology contained in Mr. Gibbs'
13 letter for all states including Florida, the reported TPIU factor would be
14 much more representative of the actual jurisdiction of the traffic.

15
16 Q. HAS THRIFTY CALL PROVIDED ANY EXCUSES IN THE PAST
17 FOR MISREPORTING THE TPIU FACTOR?

18 A. Yes. Based on Thrifty Call's arguments in the NCUC proceeding, BellSouth
19 fully expects Thrifty Call to claim that it uses the "entry-exit surrogate"
20 method of jurisdictional separation. BellSouth expects that Thrifty Call will
21 argue that, because its switch is located in Atlanta, Georgia, it can categorize
22 all Florida calls as interstate calls, even if the calls were both originated and
23 terminated in Florida. This is incorrect. A call is an intrastate call if the

1 originating and terminating points of that call are in the same state. The
2 jurisdiction is not affected by whether the call is switched in, or routed
3 through, another state. Further, the FCC's entry-exit order applies only to
4 Feature Group A and a Feature Group B traffic, which does not apply to
5 Thrifty Call because it ordered Feature Group D access services from
6 BellSouth.

7
8 In addition, based on a response to an interrogatory in the North Carolina
9 proceeding, BellSouth also expects Thrifty Call to argue that it assumed the
10 traffic passed to Thrifty Call by other carriers was interstate in nature.
11 However, there apparently was no attempt by Thrifty Call to discern the
12 actual jurisdiction of the traffic.

13
14 Q. DOES THRIFTY CALL HAVE AN OBLIGATION TO KNOW THE
15 JURISDICTION OF CALLS IT SENDS TO BELLSOUTH FOR
16 TERMINATION?

17
18 A. Yes. The TPIU factors that Thrifty Call reported to BellSouth are Thrifty
19 Call's representation that the TPIU factor mirrors as closely as possible the
20 actual jurisdiction of the calls. As I pointed out previously, the TPIU factors
21 reported by Thrifty Call are used as the basis for determining the correct
22 jurisdictional access rate. If Thrifty Call did not know, or wasn't sure of, the

1 jurisdiction of the traffic it received from any other carrier, it had an
2 obligation to determine that information from the carrier.

3

4 Q. FOLLOWING BELLSOUTH'S NOTIFICATION TO THRIFTY CALL
5 OF ITS INVESTIGATION OF TRAFFIC TERMINATING TO
6 BELLSOUTH, DID THE NATURE OF THRIFTY CALLS TRAFFIC
7 CHANGE?

8

9 A. Thrifty Call did not change its reported TPIU factor, however the quantity
10 of traffic terminated to BellSouth in Florida began to drop sharply. (See
11 Exhibit MH-3). BellSouth believes that the onset of its investigation into
12 Thrifty Call's termination of traffic caused either Thrifty Call or one of its
13 larger wholesale customers to seek other routes for the traffic. As the graph
14 in Exhibit MH-3 illustrates, Thrifty Call's terminating traffic to BellSouth
15 decreased substantially from nearly 14 million minutes-of-use in the January
16 2000 access bill period, to zero in just two months.

17

18 Q. WHAT WERE YOUR CONCLUSIONS WITH RESPECT TO THE
19 RESULTS OF THE STEPS OUTLINED ABOVE?

20

21 A. While BellSouth did not have sufficient data to calculate an actual TPIU
22 factor, it was apparent that the percentage of interstate traffic from Thrifty
23 Call was far less than the 98% TPIU it consistently reported to BellSouth.

1 Additionally, the fact that Thrifty Call apparently stripped originating call
2 detail to disguise the jurisdiction of the traffic caused BellSouth to be
3 increasingly suspicious of the validity of the reported TPIU factor.

4

5 Q. DO THRIFTY CALL'S WHOLESALE CUSTOMERS HAVE AN
6 OBLIGATION TO INFORM THRIFTY CALL OF THE ACTUAL
7 JURISDICTION OF THE TRAFFIC THAT IT HAS ARRANGED TO
8 PAY THRIFTY CALL TO TERMINATE?

9

10 A. Prudent business practices would suggest that both carriers should have a
11 common understanding of the nature of the traffic in order to ensure that
12 whatever financial arrangements are in effect to terminate the traffic are
13 consistent with payment of the correct switched access rate.

14

15 BellSouth recognizes the possibility that certain carriers may approach an
16 interim carrier, such as Thrifty Call, with a proposal to terminate traffic
17 with a higher switched access rate, such as intrastate access, as traffic with a
18 lower access rate, such as interstate access. That is why it is critical that the
19 specific carrier terminating traffic to BellSouth be responsible for the correct
20 reporting of the actual jurisdiction of that traffic. Otherwise, neither carrier
21 would accept responsibility nor claim to know the originating point of the
22 traffic, particularly in cases where the originating information, such as ANI,
23 has been deleted.

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Q. HOW MUCH IN ACCESS CHARGES DOES THRIFTY CALL OWE BELLSOUTH AS A RESULT OF MISREPORTING THE TPIU FACTOR?

A. The total amount owed for the billing period from January 1998 through April 2000 is \$2,201,515.

Q. HOW DID BELLSOUTH ARRIVE AT THIS AMOUNT?

A. BellSouth first utilized historical records from its Carrier Access Billing System ("CABS") to determine total minutes-of-use, by month, terminating to BellSouth from Thrifty Call. The number of minutes from Thrifty Call that were billed at the interstate terminating access rate, were recalculated using the intrastate terminating access rate in effect at that time. Since BellSouth's MATV test call analysis determined that the vast majority of calls terminated to BellSouth from Thrifty Call were intrastate, the rate difference between interstate and intrastate was applied to all minutes billed at the interstate access rate.

Q. HAS BELLSOUTH DISCONTINUED SERVICE TO THRIFTY CALL IN FLORIDA AS BELLSOUTH INDICATED IT WOULD DO IT ITS COMPLAINT?

1 A. Not at this time. Since Thrifty call began shutting down its operation in
2 Florida following the initiation of inquiry into Thrifty Call in several states
3 and its CLEC subsidiary, BellSouth has not pursued this course of action.

4
5 However, BellSouth may invoke that action at a later date. While Thrifty
6 Call stopped terminating traffic to BellSouth in Florida after April 2000,
7 Thrifty Call (or its restructured entity, Grande Communications) could
8 begin terminating traffic again very quickly. Largely for that reason,
9 BellSouth formally requested in its Complaint that this Commission order
10 Thrifty Call to refrain from further intentional and unlawful reporting on a
11 going-forward basis.

12
13 Q. WHAT DO YOU BELIEVE THIS COMMISSION SHOULD DO?

14
15 A. I believe that once the Commission has reviewed the record in this case, it
16 will conclude that Thrifty Call misrepresented traffic it sent to BellSouth
17 through a TPIU factor that had little or no relationship to the actual
18 jurisdiction of the traffic. Thrifty Call first reported, and then allowed its
19 inflated TPIU factor to remain in effect, purely for financial gain. I
20 recommend that the Commission order Thrifty Call to pay the correct
21 intrastate access charges owed to BellSouth.

22
23 Q. DOES THIS CONCLUDE YOUR TESTIMONY?

1 A. Yes it does.

2

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

<p style="text-align: center;">In the Matter of</p> <p>BellSouth Telecommunications, Inc., Complainant</p> <p style="text-align: center;">v.</p> <p>Thrifty Call, Inc., Respondent</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ORDER DENYING MOTION AND SETTING HEARING</p>
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BY THE CHAIR: On May 11, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint against Thrifty Call, Inc. (TCI) alleging that TCI had "intentionally and unlawfully" reported erroneous Percent Interstate Usage (PIU) factors to BellSouth in violation of BellSouth's Intrastate Access Tariff (See Section E2.2.14, Jurisdictional Report Requirements) and Commission rules. The PIUs provided by TCI result in an under-reporting of intrastate terminating access minutes terminated to BellSouth, resulting in the loss of approximately \$2 million through the loss of intrastate access revenues.

BellSouth explained that BellSouth and TCI use the PIU reporting method to determine the jurisdictional nature of the traffic being exchanged by the parties and the resulting appropriate billing rate for such traffic. The PIU factor provided by TCI to BellSouth is 98% interstate. The intrastate access rate is higher than the interstate access rate, meaning that it costs TCI less in switched access charges to report terminating interstate minutes than it does to terminate intrastate minutes.

BellSouth stated that in March 1999, it had noticed an abrupt change in the amount of terminating interstate minutes. These increased to over 4,000,000 minutes per month. This caused BellSouth to initiate an investigation using test calls. Among other things, BellSouth placed 171 intrastate test calls and found that TCI did not deliver the Calling Party Number (CPN) for any of the 171 calls. This is evidence of an effort to disguise the jurisdictional nature of the traffic.

BellSouth further stated that in early 2000, it had requested information from TCI to pursue an on-site audit of TCI to determine the PIU of traffic being terminated to BellSouth. TCI purported to agree to an audit, but insisted on terms that would make verification difficult.

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

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-447. SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
BellSouth Telecommunications, Inc.,)	
)	
Complainant,)	
)	
v.)	RECOMMENDED ORDER
)	RULING ON COMPLAINT
Thrifty Call, Inc.,)	
)	
Respondent.)	

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on December 5, 2000, at 9:00 a.m.

BEFORE: Commissioner Sam J. Ervin, IV
Commissioner William R. Pittman
Commissioner J. Richard Conder

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Andrew D. Shore, BellSouth Telecommunications, Inc., 1521 BellSouth Plaza, Post Office Box 30188, Charlotte, North Carolina 28230

Michael Twomey, BellSouth Telecommunications, Inc., Legal Department, Suite 1870, 365 Canal Street, New Orleans, Louisiana 70130-1102

FOR THRIFTY CALL, INC.:

Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Post Office Box 1800, Raleigh, North Carolina 27602

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

BY THE COMMISSION: BellSouth Telecommunications, Inc., (BellSouth) initiated this proceeding on May 11, 2000, by filing a Complaint against Thrifty Call, Inc., (Thrifty Call). BellSouth alleged that Thrifty Call had misreported PIU factors to BellSouth under its tariffs, by intentionally overstating its percent interstate usage. On May 15, the Commission ordered that BellSouth's Complaint be served upon Thrifty Call.

On June 5, 2000, Thrifty Call responded to BellSouth's Complaint by filing a Motion to Dismiss or, in the Alternative, to Stay. Based on the language of BellSouth's own tariff, Thrifty Call argued that the Commission should dismiss or at least stay BellSouth's Complaint, given that BellSouth had requested relief that it was beyond the powers of the Commission to grant. On June 7, 2000, the Commission ordered that Thrifty Call's response be served upon BellSouth.

On June 21, 2000, BellSouth filed a reply in opposition to Thrifty Call's Motion to Dismiss or Stay.

On June 23, 2000, the Commission issued an Order Denying Motion and Setting Hearing, which denied Thrifty Call's request for dismissal or a stay, set this matter for hearing at 9:30 a.m. September 19, 2000, and established a schedule for the submission of prefiled testimony.

On July 12, 2000, BellSouth served its first set of data requests upon Thrifty Call, consisting of both interrogatories and requests for production of documents.

On August 1, 2000, Thrifty Call filed a Motion for Reconsideration of the Commission's Order Denying Motion and Setting Hearing, reiterating its arguments that the language of the tariff in question compelled the conclusion that the Complaint should be dismissed and further pointing out that the relief requested by BellSouth was either moot or beyond the Commission's jurisdiction to grant.

On the same date, BellSouth filed a Motion for Entry of Procedural Order, in which BellSouth requested that the Commission establish a discovery schedule and postpone the hearing in order to provide adequate time for the completion of discovery.

On August 8, 2000, BellSouth filed a Response to Motion for Reconsideration and Request for Stay of Discovery and asked that the Commission deny Thrifty Call's Motion.

On August 11, 2000, the Commission issued an Order Denying Motion for Reconsideration and Granting Motion for Procedural Order that denied Thrifty Call's Motion for Reconsideration. The Order also established procedures for the conduct of discovery, rescheduled the hearing in this matter for 1:30 p.m. on December 4, 2000, and established a new schedule for the submission of prefiled testimony.

On August 18, 2000, Thrifty Call filed objections to BellSouth's data requests. On September 6, 2000, the Commission issued an order overruling all objections, save for one.

On September 13, 2000, Thrifty Call filed a Motion for Temporary Stay with the Commission seeking an order temporarily staying Thrifty Call's obligation to respond to BellSouth's data requests pending application for Writ of Certiorari to the North Carolina Court of Appeals.

On September 14, 2000, Thrifty Call filed a Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals, seeking interlocutory review of the Commission's failure to dismiss BellSouth's Complaint. On September 14, the Court of Appeals issued an order temporarily staying the proceedings before the Commission. On September 29, 2000, BellSouth filed a Response in Opposition to Thrifty Call's Petition for Writ of Certiorari and Petition for Writ of Supersedeas. On October 4, 2000, the Court of Appeals issued an order denying Thrifty Call's Petition for Writ of Certiorari and Petition for Writ of Supersedeas.

After the exchange of discovery, on October 20, 2000, BellSouth filed the testimony and exhibits of Mike Harper, and the testimony of Jerry Hendrix.

On November 3, 2000, Thrifty Call filed the testimony and exhibits of Harold Lovelady.

On November 8, 2000, BellSouth requested that the Commission reschedule the hearing in this matter for 9:00 a.m. on December 5, 2000.

On November 13, 2000, BellSouth filed the rebuttal testimony of Mike Harper.

On that same date, the Commission issued an Order rescheduling the hearing in this matter for 9:00 a.m. on December 5, 2000.

At the evidentiary hearing, which began as scheduled on December 5, 2000, BellSouth offered the testimony of Mike Harper and Jerry Hendrix. Thrifty Call offered the testimony of Harold Lovelady.

FINDING OF FACT

1. Thrifty Call misrepresented Terminating Percent Interstate Usage to BellSouth in the period from 1996 to 2000 and should pay BellSouth \$1,898,685.00 representing the amount in intrastate switched access charges Thrifty Call should have paid for that period.

2. BellSouth was not required to conduct an audit of Thrifty Call prior to filing a complaint for relief.
3. Additional arguments raised by Thrifty Call are without merit.

**EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 1**

This case involves the calculation and reporting of Terminating Percent Interstate Usage (TPIU) factors with respect to certain Feature Group D (FGD) traffic. BellSouth contends that Thrifty Call has misreported 98% of its terminating traffic as interstate when in fact 90% was intrastate. The practical importance of this relates to the payment of access charges. Since access charges for interstate traffic tend to be lower than those for intrastate traffic, a higher TPIU means the payment of less access charges. BellSouth seeks payment from Thrifty Call in the amount of \$1,898,685, representing the amount of intrastate switched access charges it maintains that Thrifty Call should have paid in the period 1996 to 2000.

Thrifty Call is an interexchange carrier (IXC) whose network operated in relevant part as follows: Thrifty Call would receive traffic originating in North Carolina from another IXC, usually MCI WorldCom. That traffic would be "routed" to Thrifty Call's switch in Atlanta, Georgia. Thrifty Call would route the traffic over its own network back to North Carolina for delivery to BellSouth and, ultimately, to end-users. Thus, it is apparent and, indeed, uncontested that the traffic both originated and terminated in North Carolina. Thrifty Call witness Lovelady admitted that at least 90 % of the calls originated and terminated in North Carolina. The call detail records reluctantly provided by Thrifty Call confirm this. How, then, could such traffic be converted from intrastate to interstate traffic?

The answer that Thrifty Call returns is that it was appropriately relying on the FCC's entry-exit surrogate (EES) methodology. BellSouth replies that this methodology was not meant to apply to FGD traffic. Rather, the appropriate standard is to be found in BellSouth's intrastate tariff, which clearly supports BellSouth's view.

The two tariffs are in pertinent part set out as follows:

1. BellSouth Telecommunications, Inc. Tariff FCC No. 1 (FCC Tariff) ¶ 2.3.10(AX1)(a)

Pursuant to Federal Communications Commission Order FCC 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 communication 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 number) is situated is an interstate communication. (emphasis added)¹

2. BellSouth Telecommunications, Inc. Access Services Tariff (Intrastate Tariff)
§E.2.3.14 (A)(2)(a)

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 station) is situated is an interstate communication.

A comparison of the language of the two tariffs yields substantial similarities and a few differences. Both indicate that if the two relevant points are within the state, then the call is intrastate. If the relevant points are in different states, the call is interstate. The principal difference is that the FCC tariff uses the phrase "enters a customer's network" while the intrastate tariff uses the word "originates."

This is the nub of Thrifty Call's argument. Thrifty Call argues that the calls enter its network in Atlanta and go to North Carolina. They are, therefore, ipso facto interstate calls, regardless of where they originate or terminate.

This argument, though ingenious, is also specious. The FCC Tariff language states "enters a customer network" (emphasis added), not necessarily Thrifty Call's network. The call that Thrifty Call is carrying in fact originates and terminates in North Carolina. The record is uncontroverted that, with respect to the minutes of use at issue, Thrifty Call is acting as a subcontractor for another IXC. For the purposes of properly construing this language, "enters a customer network" refers to the IXC whose customer originates the call.² There is one call, not two.

¹According to Thrifty Call, this tariff applies to FGD traffic as well as to Feature Group A (FGA) and Feature Group B (FGB) traffic. (See, FCC Tariff ¶ 2.3.10(A)(1)(b); however, the original FCC Order 85-145 addressed FGA and FGB only).

²It should be recalled that the language ultimately derived from an FCC Order issued in 1985-- close to telecommunications prehistory from our present perspective. The somewhat odd and "antique" use of the phrase derives from the fact that the originating IXC is a "customer" to the ILEC's access services. The preferred modern usage is "originating."

This conclusion is buttressed by further considerations. First, if Thrifty Call's interpretation were correct, it would mean open season for the "laundering" of minutes of use. An originating carrier with large amounts of intrastate traffic might be irresistibly tempted to convert such intrastate traffic into interstate traffic through the simple expedient of handing off such traffic to another IXC with a switch in a different state. Such IXCs might be irresistibly tempted to enter into financial arrangements based on the avoidance of the payment of intrastate access charges otherwise due. It is undoubtedly better to remove this temptation than to abet it.

Second, if Thrifty Call were correct, then it should have applied the same methodology in Georgia. Logically, most Georgia calls should have been intrastate. At hearing, however, Thrifty Call admitted in Georgia that it used the originating and terminating points of the calls to determine whether the call was intrastate or interstate. Thrifty Call was apparently selective in its adherence to the EES methodology.

In summary, it does not matter which tariff is used to arrive at the TPIU. The conclusion is the same. The traffic at issue is intrastate if it originates and terminates in North Carolina or if it "enters a customer network" in North Carolina and terminates in North Carolina. It does not matter whether more than one IXC is involved or where in the country the call is switched between the beginning point and the end point. It is not necessary to establish that Thrifty Call has evil intent or that it "intentionally" misreported the minutes of use to require that Thrifty Call pay what it ought to have paid to begin with. It is sufficient that the minutes of use were misreported.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

One of the long-running sub-themes of this proceeding is Thrifty Call's insistence that BellSouth was obliged by Tariff Section E2.3.14 (B)(1) to perform an audit of Thrifty Call prior to filing a complaint. Thrifty Call also wanted to limit the audit to adjusting the PIU on a going-forward basis. Thrifty Call has continued in its past-hearing filings to argue this issue.

The Commission has twice ruled against Thrifty Call on this issue--first, in its June 23, 2000, Order Serving Motion and Setting Hearing and, second, in its August 11, 2000, Order Denying Motion for Reconsideration and Granting Motion for Procedural Order--noting that the tariff provision was permissive, not mandatory. The Commission sees no reason to change its view on the matter now and reaffirms it based on the reasoning set out previously.

**EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 3**

Additional arguments raised by Thrifty Call are also without merit.

Thrifty Call has questioned the Commission's authority to award backbilling in this proceeding because BellSouth has allegedly not supported its calculation of the \$1,898,685 in "unbilled access charges" and is in any case limited by its tariffs, any deviation from which would constitute an award of damages.

On the contrary, the Commission believes that the \$1,898,685 is well supported. See, e.g., Harper Direct, Tr. at 20-21. The Commission's authority to require the payment of sums that should have been paid but were not because of inappropriate classification is well-established and does not constitute an award of damages. Thrifty Call's argument that BellSouth's recovery is limited by its tariff is simply a variation of its argument rejected in Finding of Fact No. 2.

Thrifty Call has also suggested that BellSouth is barred by the doctrine of laches from the relief it requests. The Commission does not believe that BellSouth engaged in an unreasonable delay injurious or prejudicial to Thrifty Call in bringing its complaint.

IT IS, THEREFORE, ORDERED that Thrifty Call shall pay BellSouth the amount of \$1,898,685, representing the amount of intrastate access charges Thrifty Call should have paid.

ISSUED BY ORDER OF THE COMMISSION.

This the 11th day of April, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

pb040401.01

Commissioner William R. Pittman resigned from the Commission on January 24, 2001, and did not participate in this decision.

**GRAPHICAL ILLUSTRATION OF
MINUTES-OF-USE, BY MONTH, TERMINATING
TO BELLSOUTH FROM THRIFTY CALL IN FLORIDA**

Harper Exhibit **MH-3**
Florida Docket No. 000475 - TP

