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December 3, 2001

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

Re: Docket No. 011378-TP
Complaint Against Global Crossing

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Opposition to Global Crossing Telecommunications, Inc.'s Motion to Dismiss BellSouth's Complaint or, in the Alternative, to Hold in Abeyance BellSouth's Complaint, 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,

James Meza III

James Meza III

(28)

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

APP
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COM 5
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CERTIFICATE OF SERVICE
Docket No. 011378-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express this 3rd day of December, 2001 to the following:

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James Meza III
James Meza III
(JR)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint by BellSouth Telecommunications, Inc. Against Global Crossing Telecommunications, Inc. regarding practices in reporting of percent interstate usage for compensation for jurisdictional access services.	)Docket No.: 011378-TP))))) Filed: December 3, 2001

OPPOSITION TO GLOBAL CROSSING TELECOMMUNICATIONS, INC'S MOTION TO DISMISS BELLSOUTH'S COMPLAINT OR, IN THE ALTERNATIVE,TO HOLD IN ABEYANCE BELLSOUTH'S COMPLAINT

BellSouth Telecommunications, Inc. ("BellSouth") submits this Memorandum in Opposition to Global Crossing Telecommunications, Inc.'s Motion to Dismiss BellSouth's Complaint or, in the alternative to hold in abeyance BellSouth's Complaint ("Motion").

INTRODUCTION

BellSouth filed its Complaint against Global Crossing Telecommunications, Inc. ("Global Crossing") because BellSouth discovered that, for a number of years, Global Crossing had over reported its percentage of interstate usage ("PIU"), thus understating its intrastate minutes of use. Such under reporting has the effect of reducing the amount Global Crossing pays BellSouth pursuant to BellSouth's intrastate access tariffs.

Global Crossing seeks to have this Commission dismiss BellSouth's Complaint on a number of grounds. In the alternative, Global Crossing requests that the Commission hold these proceedings in abeyance pending the outcome of a declaratory judgment action that Global Crossing filed in federal court in anticipation of BellSouth's claims. Global Crossing's motion should be denied for the reasons set forth below.

BACKGROUND

In order to understand the dispute between BellSouth and Global Crossing, some background is necessary. Global Crossing is an interexchange telecommunications company that provides intrastate and interstate interLATA long-distance service to customers in various states, including Florida. Interexchange companies are dependent on the networks of local exchange companies, such as BellSouth, in order to access their customers. A typical interLATA long-distance telephone call originates on one local exchange company's network, passes through an interexchange company's facilities (one or more) and then terminates on the network of a local exchange company (which may be the same company on whose network the call originated). Using local exchange companies' facilities to complete interLATA long-distance telephone calls is referred to as "access."

Local exchange companies charge interexchange companies for access services on a per-minute-of-use basis. These charges are referred to as "access charges." Interexchange companies pay access charges both to the local exchange company on whose network the call originated ("originating access charges") and to the local exchange company on whose network the call terminated ("terminating access charges").

The rates that BellSouth charges Global Crossing for the access services vary according to whether, for each particular call, the access service is used to complete an intrastate long-distance telephone call or an interstate long-distance call. An intrastate call is one that originates within the same state as the called station. See § 2.3.14A.1.a of BellSouth's Access Services Tariff. The access charge for an intrastate long-distance call is set by BellSouth's tariffs on file with and approved by this Commission. The access

charge for an interstate long-distance call is set by BellSouth's tariffs on file with and approved by the Federal Communications Commission ("FCC"). Historically, there has been a difference between the intrastate access charges and interstate access charges.

The monthly charge for interstate access services that BellSouth provides to Global Crossing and similar interexchange companies is determined by (1) determining the total monthly usage (in minutes) attributable to that company; (2) calculating the percentage of interstate use ("PIU"); (3) multiplying the total monthly usage by the PIU; and (4) multiplying that figure by the applicable interstate access charge. The monthly charge for intrastate access services is determined by multiplying the total monthly usage by the intrastate usage (100% minus PIU), and then multiplying that figure by the applicable intrastate rate. The total monthly charge for all access services is determined by adding the interstate and intrastate usage together.

BellSouth can determine the total monthly usage (in minutes) attributable to a company. BellSouth can also determine the originating PIU ("OPIU") because it is able to track which calls originate on its network. However, until recently, BellSouth could not, through its own equipment, determine the terminating PIU ("TPIU") for an interexchange company. Instead, the individual interexchange companies, such as Global Crossing, had to report their TPIU to BellSouth. This reporting requirement is set forth in Sections E2.3.14(A) and (B) of BellSouth's Intrastate Access Services Tariff. In calculating the amounts due and owing from Global Crossing and other interexchange companies for the terminating access services they purchased, BellSouth relied on each company's integrity and the accuracy of their reports.

Because the rates for interstate usage are typically lower than the rates for intrastate usage, a reseller can dramatically reduce its cost of doing business by overstating its PIU to BellSouth. This has the effect of overstating the percentage of calls that are subject to the lower interstate rates and understating the percentage of calls that are subject to the higher intrastate rates.

Recently, BellSouth installed a new computer system, the Agilent system, which permits BellSouth to determine TPIU for each interexchange company accurately. After reviewing Global Crossing's call-activity records, BellSouth determined that Global Crossing had misreported its TPIU. As a result of the misreported TPIU, Global Crossing paid less intrastate access charges than it should have.

ARGUMENT

I. The Dispute Between BellSouth and Global Crossing Is Governed by BellSouth's Intrastate Tariff.

In its Motion, Global Crossing makes several attempts to argue that the instant dispute should be decided pursuant to federal law and/or BellSouth's Federal Communications Commission ("FCC") interstate tariff. The underlying flaw with this argument is that it assumes that this matter is governed by BellSouth's *interstate* access tariff. Contrary to Global Crossing's misguided and unsupported allegations, BellSouth's complaint only involves Global Crossing's failure to pay amounts due pursuant to its *intrastate* access tariff filed with and approved by this Commission. As will be established below, other state and federal regulatory commissions have recognized that claims, such as those brought by BellSouth against Global Crossing, are governed by *intrastate* tariffs and thus are outside the jurisdiction of the FCC and are properly resolved by state regulatory commissions.

A. The FCC's EES Methodology Order Does Not Apply to Global Crossing.

In seeking to have the matter resolved by the FCC tariff, Global Crossing's first relies on the FCC order, Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, Memorandum and Order, 4 FCC Rcd 8448 (1989) ("EES Methodology Order"). Global Crossing's reliance on this order is misplaced. That order dictates that, when an interstate carrier uses Feature Group A or Feature Group B access service and it is not possible to determine where the call originates, then for purposes of determining interstate usage, the interexchange carrier should assume that the call originates where it enters its network. This methodology is referred to as the "entry-exit surrogate" or "EES" methodology.

The following example illustrates how this methodology works: a call from Tallahassee to Atlanta is interstate and normally would be governed by interstate access tariffs. However, if a long distance carrier receives the call to Atlanta and 1) the carrier is using Feature Group A or B; 2) the carrier is unable to determine the origin of the call; and 3) the call enters the carrier's network in Georgia, then the call would be treated as intrastate under the EES methodology, even though it is truly interstate. Similarly, a call from Tallahassee to Miami is intrastate and is normally governed by intrastate access tariffs. However, if a long distance carrier receives the call to Miami and 1) the carrier is using Feature Group A or B; 2) the carrier is unable to determine the origin of the call; and 3) the call enters the carrier's network in Georgia, then the call would be treated as interstate under the EES methodology even though it is truly intrastate.

Importantly, Global Crossing fails to inform this Commission that the EES Methodology Order is inapplicable to the instant dispute because Global Crossing does not utilize Feature Group A or B access services. Instead, Global Crossing only uses Feature Group D services. Thus, the instant dispute is not governed by the FCC Order on which Global Crossing relies. Moreover, with Feature Group D service, Global Crossing should always be able to determine where a call originates and thus there is no reason to rely on a "surrogate" methodology. Accordingly, the rationale for the EES methodology does not apply to Global Crossing.

Even if the EES methodology applied to Global Crossing, which it does not, BellSouth's intrastate tariff states that whether a call is interstate or intrastate depends upon the end points of the call. See § E2.3.14(A)(1)(a). The tariff establishes unequivocally that, if the calling party and the called party are located within the same state, then the calls are intrastate, regardless of whether the intervening switching or transport routes the calls to another state. Thus, for the purposes of determining the appropriate billing of access charges between BellSouth and Global Crossing, the tariff controls. Accordingly, Global Crossing was required to use the methodology in BellSouth's intrastate tariff when it calculated its PIU. That methodology plainly requires that the end points of the call be used to determine the intrastate and interstate nature of the calls.

Other state commissions have reached similar conclusions regarding this issue, finding that the end points of the call determine whether a call is intrastate or interstate in nature. For instance, in a PIU dispute in North Carolina between BellSouth and Thrifty Call, Thrifty Call, like Global Crossing here, argued that the matter should be governed

by BellSouth's interstate tariff and that under the interstate tariff, the calls were interstate in nature using the EES methodology. After rejecting each of Thrifty Call's arguments on this issue, the North Carolina Utilities Commission ("NCUC") summed up its position as follows: "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." See Recommended Order Ruling on Complaint, In the Matter of BellSouth Telecommunications, Inc. v. Thrifty Call, Inc., North Carolina Utilities Commission Docket No. P-447, Sub 5, April 11, 2001.[1]

The Idaho Public Utilities Commission has interpreted the FCC's EES methodology in a similar manner. See Northwest Telco, Inc. v. Mountain States Telephone and Telegraph Company, 88 P.U.R. 4th 462, 1987 WL 258025 (Idaho P.U.C. 1987). As the Idaho P.U.C. explained in Northwest Telco,

> As discussed below, the simple rule adopted by the Federal Communications Commission and by this Commission is that when a call has an end user origination and termination in the same state it is jurisdictionally an intrastate call for regulatory purposes. The intermediate transport or switching does not alter the jurisdictional nature of the call even if it occurs outside the state's boundaries.
>
> We further observe that any other result would be a complete fiction. If a person residing in Boise wants to call a person in Pocatello, the call does not become an interstate call because Tel-America had decided to route the call through another state. The law occasionally uses fiction to help it reach a common-sense result, but we should not use fiction to reach a result that makes no sense.
>
> The Commission finds that it is appropriate to mirror the FCC's definition of an intrastate call given in Memorandum Opinion and Order

[1] A copy of this Recommended Order is attached as Exhibit "A." The North Carolina Utilities Commission confirmed this Order on June 14, 2001. Final Order Denying Exceptions and Affirming Recommended Order, "In the Matter of BellSouth Telecommunications, Inc. v. Thrifty Call, Inc.," North Carolina Utilities Commission Docket No. P-447, Sub 5. A copy of the Final Order is attached as Exhibit "B."

> released April 16, 1985, Re MCI Telecommunications Corp. While Tel-America I correct in its observation that the entry/exit surrogate adopted by the FCC in that Order is of an interim nature, the FCC did specifically state:
>
> "We are, therefore, of the view that interstate usage generally ought to be estimated as though every call that enters an OCC network at a point within the same state as that in which the station designated by dialing is situated were an intrastate communication and every call for which the point of entry is in a state other than that were the called station is situated were an interstate communication."
>
> From this statement, the Commission concludes that where the calling party and the called party are located within the same state is considered by the FCC and should be considered by us to be an intrastate call. These calls should be billed accordingly by local exchange companies out of their intrastate tariffs.

Thus, not only does BellSouth's intrastate tariff mandate finding that calls that originate and terminate in North Carolina are intrastate, but as the NCUC and the Idaho P.U.C. both recognize, a proper interpretation of the FCC's position mandates the same result.

B. The Underlying Dispute Is Governed by BellSouth's Intrastate Tariff.

Additionally, Global Crossing argues that BellSouth's PIU Complaint should be resolved "pursuant to the FCC's orders and BellSouth's FCC tariff" and that because "issues of PIU concern interstate as well as intrastate percentages[,] . . . BellSouth cannot be permitted to proceed under the state tariff when the issues also implicate the federal tariff." Motion at 10-11. In other words, according to Global Crossing, individual state tariffs regarding PIUs are essentially meaningless.

Such an argument flies in the face of the long-standing dual regulatory regime for interstate and intrastate communications and has been squarely rejected by the FCC. See In the Matter of LDDS Communications, Inc. v. United Telephone of Florida, 15 FCC

Rcd 4950, FCC Lexis 1181 (Adopted March 7, 2000; released March 8, 2000).[2] In LDDS, after completing an audit, United Telephone Company ("United") concluded that LDDS had under-reported its PIU factor. As a result, United adjusted the PIU factor and back billed LDDS for the resulting difference in access charges. LDDS paid the amount in dispute and then filed a complaint proceeding with the FCC in which it sought to have United ordered to refund the disputed amount. In the FCC proceeding, LDDS contended that United's actions violated United's FCC tariff, which was silent on the issue of back billing. In response, United argued that the back billing was for underpayment of intrastate access charges that were governed by United's intrastate tariff, which expressly permitted back billing.

In dismissing LDDS' complaint, the FCC initially set forth the well-settled legal principle that governs this dispute: interstate and intrastate communications are "regulated by two separate but parallel tracks by independent agencies – the FCC for interstate communications and the appropriate state commission for intrastate communications." Id. at ¶ 3. Using this analysis, the FCC found that the transaction at issue – intrastate access charges – fell "squarely within the jurisdiction of the Florida PSC" and was outside the jurisdiction of the FCC:

> 10. LDDS argues that the back billing of which it complains constituted a single, unified transaction to which the Commission's jurisdiction necessarily attaches in the light of the involvement of United's federal tariff. In an apparent effort to avoid the fact that the retroactive billing involved calculations under both the Florida and the federal tariffs, LDDS contends that it is actually the retroactive adjustment of the PIU of which it complains. Thus LDDS contends that, given the reciprocal relationship between interstate and intrastate minutes of use, "any change to the

[2] Despite its clear application to the specific issues raised by Global Crossing in its motion, Global Crossing does not discuss or even cite to this decision in its Motion.

intrastate PIU automatically affects changes to the interstate PIU." In contends that, regardless of the terms of the intrastate tariff on the question, the interstate tariff prohibits back billing. To effectuate this prohibition fully, LDDS then assets it must be extended to prohibit the retroactive adjustments to intrastate minutes of use that United accomplished in this case.

11. The difficulty with LDDS's argument is that it conflates what were actually separate (albeit related) transactions, which were independently subject to the restrictions in two separate tariffs. The relationship between interstate and intrastate minutes of use does not subject to federal law, and the terms of the interstate tariff, all changes in a carrier's minutes of intrastate use. Rather, the traffic measurement process identifies the jurisdiction to which an Ice's traffic is assigned. Once the assignment has been accomplished, it is the appropriate tariff as construed and applied by the proper regulatory authority that governs the process for charging for minutes of use. In light of this regulatory structure, LDDS's complaint is properly viewed as challenging the two separate calculations – performed under two different tariffs – that resulted in United's retroactive adjustment of the access charge liability.

12. The first transaction is the reduction of the carriers' interstate access-charge liability. To the extent that LDDS challenges this transaction, it challenges an access-charge calculation under a tariff filed with the FCC and over which the Commission certainly has jurisdiction. On the other hand, the second transaction is plainly outside the Commission's jurisdiction. In calculating the new intrastate access charges, United applied the terms of its intrastate tariff to the revised figure for intrastate minutes of use. Under the Act's dual-track system, this transaction falls squarely within the jurisdiction of the Florida PSC; as such it is beyond the jurisdiction of the Commission.

The FCC also rejected LDDS's argument, which is the same argument raised by Global Crossing, that the related nature of interstate and intrastate traffic requires that the dispute be resolved through BellSouth's FCC tariff. Specifically, the FCC held that, "[g]iven the restrictions on our authority, the relationship between percentage of

interstate and intrastate use provides an insufficient basis for us to exercise jurisdiction over the retroactive adjustment of LDDS's intrastate access charge liability." Id. at 13.

Accordingly, there can be no question that BellSouth's Complaint is outside the jurisdiction of the FCC and that BellSouth's intrastate access tariff governs. Indeed, the Commission recently held as such in BellSouth's PIU Complaint against Thrifty Call (Docket No. 000475-TP), finding, among other things, that certain provisions of BellSouth's FCC's interstate tariff are not "instructive" or "pertinent" in deciding BellSouth's complaint regarding the under-reporting of intrastate terminating access minutes. See Order Granting Motion to Stay, In re: Complaint by BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services, Order No. PSC-01-2309-PCO-TP at 5.[3]

Next, in another futile attempt to circumvent the well-settled principle that this Commission and not the FCC has jurisdiction over this dispute, Global Crossing argues that 47 U.S.C. § 152 vests the FCC or federal court with exclusive jurisdiction over the matter. See Global Crossing Motion at 8. To the contrary, this statute expressly recognizes that the FCC has no jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[,]" which are the sole matters at issue in this proceeding. Further, if Global Crossing's contention were correct, then the

[3] In Order No. PSC-01-2309-PC0-TP, the Commission granted Thrifty Call's Motion to Stay on the grounds that the FCC's determination on whether the EES methodology applies to the reporting of PIU could effect its decision in that case. As stated above, however, the EES methodology applies only to Group A and Group B services, which Global Crossing does not utilize. Instead, Global Crossing uses Group D access services.

FCC's LDDS decision and its recognition of the long-standing dual regulatory scheme are incorrect, which defies logic.

Finally, Global Crossing argues that BellSouth's claims must be heard pursuant to the FCC's orders and BellSouth's FCC tariff because, to do otherwise, could result in BellSouth receiving compensation for more than 100% of the total traffic. Motion at 10. This argument should be summarily rejected because a change in interstate PIU will be accompanied with a corresponding offsetting change in intrastate minutes. Consequently, BellSouth would not receive compensation for more than 100% of the total traffic if Global Crossing's intrastate TPIU was revised.

III. BellSouth Has Not Violated Its Intrastate Tariff.

Notwithstanding its assertion that federal tariffs and federal law govern this dispute, Global Crossing further argues that, for a variety of reasons, BellSouth's Complaint should be dismissed pursuant to state law and BellSouth's intrastate tariff. As with Global Crossing's federal argument, this argument should be summarily rejected.

A. The Commission Has the Authority to Resolve BellSouth's Complaint.

First, Global Crossing contends that the Commission does not have the authority to resolve BellSouth's Complaint. Global Crossing premises this argument on the principle that the Commission does not have the authority to award money damages. Motion at 14. The flaw in Global Crossing's argument is that BellSouth is not seeking damages in its Complaint. Instead, BellSouth is asking the Commission to find that Global Crossing misreported its PIU factor, and in compliance with BellSouth's intrastate tariff, require Global Crossing to pay BellSouth all intrastate access charges owed. Effectively, what Global Crossing is arguing is that the Commission does not have the

authority to hear disputes regarding BellSouth's intrastate tariff. Nothing can be farther from the truth.

Pursuant to Section 364.058(1), Florida Statutes, the Commission may conduct a "limited or expedited proceeding to consider and act upon any matter within its jurisdiction." Further, under Section 364.07, 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. Accordingly, based on Section 364.07, the Commission has previously held that it has the authority to hear and resolve intrastate PIU disputes. See Order Denying Motion to Dismiss or, in the Alternative, Motion to Stay, In re: 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, Order No. PSC-00-2081-PCO-TP at 1 (finding that the Commission had the jurisdiction to hear BellSouth's intrastate PIU complaint against Intermedia); see also, Order on Procedure, In re: Complaint by BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services, Order No. PSC-01-1749-PCO-TP at 1 (finding that the Commission was "vested with jurisdiction" over BellSouth's PIU complaint against Thrifty Call).

Further, BellSouth's Complaint is similar to complaints filed by ALECs against BellSouth for the alleged failure to pay reciprocal compensation for the delivery and termination of ISP-bound traffic. In these proceedings, the Commission has required BellSouth to comply with the provisions of its contract and pay the ALECs reciprocal

compensation for ISP-bound traffic. See e.g., In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreements under sections 251 and 252 of the Telecommunications Act of 1996, and request for relief, Order No. PSC-98-1216-FOF-TP.

Accordingly, contrary to Global Crossing's argument, the Commission clearly has the authority to resolve the instant dispute and find that Global Crossing should pay BellSouth all intrastate access charges owed.

B. BellSouth Was Not Obligated to Conduct an Audit Before Filing Its Claims.

Global Crossing advances several arguments predicated on BellSouth's alleged failure to initiate an audit as referred to in its intrastate tariff. Simply put, however, the audit mechanism provided for in BellSouth's intrastate tariff is an optional, not a mandatory, method to address PIU issues.

The crux of Global Crossing's 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 Global Crossing's call data. Global Crossing's argument, however, is based on a mischaracterization of BellSouth's tariff. Section E2.3.14B(1) of BellSouth's intrastate access tariff provides in relevant part:

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

The language of the tariff is clear that the audit is discretionary on the part of BellSouth. Contrary to Global Crossing'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 with the Commission for past and future claims under the tariff. Not surprisingly, Global Crossing 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.

The NCUC has agreed with BellSouth on this precise issue and held that the audit provision in BellSouth's intrastate tariff in that state, which is identical to the intrastate tariff in Florida, sets forth an optional, but not a mandatory dispute resolution mechanism. See Order Denying Motion and Setting Hearing, In the Matter of BellSouth Telecommunications, Inc. v. Thrifty Call, Inc., North Carolina Utilities Commission Docket No. P-447, Sub 5, June 23, 2000 (Exhibit "C") at 2-3.[4] In addition, the Commission has previously denied Thrifty Call's and Intermedia's Motions to Dismiss based on this same argument, finding that the Motions to Dismiss went beyond

[4] In Order No. PSC-00-2081-PCO-TP, this Commission denied Intermedia's Motion to Dismiss and Motion to Stay BellSouth's PIU Complaint. In deciding the Motion to Stay, the Commission discussed whether or not BellSouth was required to conduct an audit before initiating an action with the Commission. However, the Commission never reached a decision on this issue, finding that it was unnecessary to resolve that specific question in deciding the Motion to Stay.

BellSouth's Complaint to the ultimate issues of fact. See Order No. PSC-00-1568-PCO-TP at 6; Order No. 00-2081-PCO-TP at 3.

V. BellSouth's Claims Are Not Time Barred.

Global Crossing asserts that BellSouth's claims are time barred under several theories. Global Crossing first argues that the tariff provision limits retroactive billing to at most a one calendar quarter. See Global Crossing Motion at 17. This argument is incorrect for two reasons. First, the one quarter tariff limitation only applies when BellSouth is back billing as a result of an audit. See E2.3.14(D)(1). As discussed above and as the NCUC recognized in its Thrifty Call proceeding, the audit provision is optional, not mandatory. Thus, when the audit proceeding is not utilized, the one quarter limitation is inapplicable. Second, the tariff provision limits how far back BellSouth can go in back billing after an audit; it does not address when BellSouth must file its claim.

Next, Global Crossing cites to Rule 25-4.110(10), Florida Administrative code for the proposition that retroactive billing is limited to one year. This rule provides in pertinent part that "[w]here any undercharges in billing of a customer is the result of a company mistake, the company may not backbill in excess of 12 months." Rule 25-4.110(10), Florida Administrative Code. Rule 25-4.110(10) is inapplicable to the case at hand for several reasons. First, under the express wording of the rule, it only applies to back billing that resulted from a company's mistake. In this case, the underbilling resulted solely from Global Crossing's failure to accurately report its TPIU factor and not from any BellSouth mistake. In fact, if Global Crossing had accurately reported its TPIU factor and paid BellSouth all intrastate access charged owed, then BellSouth would have no reason to initiate the instant proceeding.

Second, it is doubtful that this rule applies in disputes between carriers, as opposed to disputes between carriers and end-user customers. For example, Rule 25-4.110, when read in its entirety establishes that it application is limited to end-users. The following examples illustrate this point:

- Subsection 3 provides that "[e]ach LEC shall provide an itemized bill for local service."

- Subsection 4 provides that an itemized bill shall include the following information: (1) number and types of access lines; (2) charges for access to the system; (3) touch tone service charge; (4) charges for custom calling features; (5) unlisted number charges; (6) local directory assistance charges; (7) other tariff charges, etc . . .

- Subsection 14 provides that "[a]ll bills produced shall clearly and conspicuously display the flowing information for each service billed in regard to each company claiming to be the customer's presubscribed provided for local, local toll, or toll service: (a) the name of the certificated company; (b) type of service provided, i.e., local, local toll, or toll; and (c) a toll-free customer service number.

In addition, the Commission has applied an identical rule applicable to water utilities only in relation to end-user consumers. See In re: Application for Rate Increase in Marion County by Rainbow Springs Util., L.C., Order No. PSC-96-1229-FOF-WS (interpreting Rule 25-30.350(1), which prohibits water utilities from back billing customers for a period more than a year); In re: Request for Exemption from Florida Public Service Commission Regulation for Provision of Water Service in Putnam County by Paradise View Estates, Order No. PSC-94-0501-FOF-WU (limiting water utility's back billing of end-user customers for undercharges to one year pursuant to Rule 25-30.350(1)). Indeed, research has revealed no Commission Order where the Commission applied Rule 25-4.110(10) or a similar rule to any person other than the ultimate end-user or customer.

Global Crossing then argues that because BellSouth's intrastate tariff requires IXCs to retain call details for a minimum of six months, BellSouth cannot recover underpayments for a period beyond this six month requirement. See Motion at 18-19. Global Crossing's argument suggests that a record-keeping requirement somehow establishes a de facto statute of limitations. Such an argument conflicts with Section 95.11, Florida Law, which prescribes the time in which a party has to file a claim based on a contract. Further, it is nonsensical to take the position that, by establishing a record retention period in its tariff, BellSouth waives a claim for lawful charges beyond the retention period. Moreover, it is important to note that the six-month retention requirement in BellSouth's tariff does not preclude an IXC from maintaining records for a longer period of time. Rather, the tariff simply requires IXCs to retain call details. IXCs therefore are free to establish internal record-keeping procedures that exceed this six-month minimum.

Finally, Global Crossing asserts that Florida's statute of limitations for written contracts, Section 95.11, Florida Statutes, bars "most if not all of BellSouth's claims." Motion at 19. Contrary to Global Crossing's suggestion, the statute of limitations for an action on a written contract is five and not four years. See Section 95.11(2)(b), Florida Statutes. Further, while BellSouth agrees that tariff claims are generally subject to the statute of limitations for written contracts, such a statute is tolled when, as here, (1) the opposing party concealed the basis for the claim, see Grossman v. Greenberg, 619 So. 2d 406 (Fla. App. 3rd DCA 1993); and/or (2) the opposing party made partial payment of any part of the principal or interest of any obligation or liability founded on a written instrument, see Hospital Constructors, Ltd. v. Lifemark Hosp. of Fla., Inc., 749 So. 2d

546, 547 (Fla. 2nd D.C.A. 2000); see also, § 95.051(1)(f). Accordingly, BellSouth's claims are not time-barred.

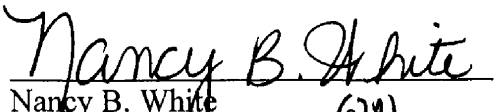
VI. This Commission Should Not Defer To Global Crossing's Federal Court Suit.

Global Crossing requested that this Commission defer to the declaratory judgment action that Global Crossing filed in federal court in Georgia in anticipation of BellSouth's claims. Specifically, Global Crossing asked that this Commission either dismiss BellSouth's Complaint or, in the alternative, stay or hold it in abeyance, pending the outcome of the federal court litigation. BellSouth is in the process of preparing and has filed a motion to dismiss the federal court litigation on grounds that the disputes are subject to the primary jurisdiction of this and other state commissions. Additionally, BellSouth, in this motion, BellSouth explained why the well-recognized abstention doctrines are applicable and dictate dismissal. While BellSouth does not object to staying further proceedings in this matter until BellSouth's motion to dismiss is resolved by the federal court, BellSouth vehemently opposes any dismissal of the present matter or any stay until the final outcome of the federal case.

CONCLUSION

For the foregoing reasons, the Commission should deny Global Crossing's Motion.

Respectfully submitted this 3rd day of December, 2001.



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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

Exhibit A

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 misreported 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 `````````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.

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[1] According 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).

[2] It 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.

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.	)	FINAL ORDER DENYING EXCEPTIONS AND AFFIRMING RECOMMENDED ORDER
Thrifty Call, Inc. Respondent	)	

ORAL ARGUMENT HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Monday, May 21, 2001, at 2:00 p.m.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding
Commissioner Ralph A. Hunt
Commissioner Robert V. Owens, Jr.
Commissioner Lorinzo L. Joyner

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Ed Rankin and T. Michael Twomey, BellSouth Telecommunications, Inc., 1521 BellSouth Plaza, 300 South Brevard Street, Charlotte, North Carolina 28230

FOR THRIFTY CALL, INC.:

Marcus W. Trathen and Charles Coble, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, Attorneys at Law, Post Office Box 1800, Raleigh, North Carolina 27602

BY THE COMMISSION: On April 11, 2001, Commissioner Sam J. Ervin, IV and Commissioner J. Richard Conder entered a Recommended Order Ruling on Complaint. On May 3, 2001, Thrifty Call, Inc. (Thrifty Call) filed six exceptions to the April 11, 2001,

Recommended Order and requested oral argument. An Order Scheduling Oral Argument on Exceptions was issued on May 4, 2001, and the oral argument was set for May 21, 2001. On May 18, 2001, BellSouth Telecommunications, Inc. (BellSouth) filed Responses to Thrifty Call's Exceptions. This matter came on for oral argument as scheduled. Both parties were represented by counsel.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

Based upon a careful consideration of the entire record in this proceeding, the Commission finds good cause to deny Thrifty Call's exceptions and to affirm the Recommended Order. The Commission agrees with and adopts all the finding of fact and conclusions reached by the two Commissioners who heard and decided the case and concludes that the Recommended Order is fully supported by the record.

IT IS, THEREFORE, SO ORDERED as follows:

1. That the exceptions filed by Thrifty Call with respect to the Recommended Order entered in this docket on April 11, 2001, be, and the same are hereby denied.

2. That the Recommended Order entered in this docket on April 11, 2001, be and the same is hereby affirmed and adopted as the Final Order of the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 14th day of June, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief 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.	)	ORDER DENYING MOTION AND SETTING HEARING
Thrifty Call, Inc., Respondent	)	

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.

Exhibit C

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 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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