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ORIGINAL

July 27, 2005

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. Boyó:

This firm was recently served by BellSouth Telecommunications, Inc. with a Motion to Lift Stay and to Establish Procedural Schedule in the above-referenced matter. The BellSouth Motion attached a copy of a Declaratory Ruling, dated November 12, 2004, issued by an FCC staff member. Please be advised that the firm no longer represents Thrifty Call, Inc. and we should no longer be on the service list for this proceeding. For completeness of the FPSC's record in this matter, attached to this letter is an Application for Review filed by the Competitive Telecommunications Association requesting FCC reversal of the staff ruling.

Sincerely,

Danny E. Adams

CMP _____
COM _____
CTR _____
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OPC _____
RCA _____
SCR _____
SGA _____
SEC 1
OTH _____

DEA:kc

cc: Parties of Record
FPSC Staff

Certificate of Service

I hereby certify that a copy of the attached letter was served via U.S. mail, first-class, postage prepaid, on July 27, 2005 to the following individuals:

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c/o Nancy Sims
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Tallahassee, FL 32302-1876

Danny E. Adams

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

IN THE MATTER OF	)	
	)	
THRIFTY CALL, INC.	)	CB/CPD FILE NO. 01-17
PETITION FOR DECLARATORY RULING CONCERNING	)	
BELLSOUTH TELECOMMUNICATIONS, INC	)	
	)	
TARIFF F.C.C. NO. 1	)	
	)	
TO: THE COMMISSION	)	

APPLICATION FOR REVIEW

In this Application for Review, pursuant to Section 1.115 of the Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.115, the Competitive Telecommunications Association ("CompTel")/Association of Communications Enterprises ("ASCENT") Alliance ("CompTel") urges the Commission to review the *Declaratory Ruling* issued by the Wireline Competition Bureau ("WCB") in the above-referenced proceeding and reverse or revise it as necessary to apply the proper definition of "Customer" in BellSouth's federal access tariff. Further, the Commission should act to reverse the *Declaratory Ruling's* conclusion that state public utility commissions are free to apply a different jurisdictional separations process than that mandated by the FCC by permitting retroactive PIU revisions in a manner inconsistent with the Communications Act, Commission precedent and the unambiguous language of BellSouth's interstate access tariff.

As previously submitted to the Bureau, many CompTel members purchase access services from BellSouth and other ILECs. These purchases are governed by the ILECs' federal and state access tariffs. It is crucial for CompTel members to be able to rely on the proper

implementation of these tariff terms. The manner in which the Bureau skews the definition of "Customer" in the *Declaratory Ruling* is incorrect on its face and contradicts any other interpretation applied to date. More importantly, the holding of the *Declaratory Ruling* is inconsistent with 15 years of prior FCC policy and creates impossible new burdens for interexchange carriers.

The *Declaratory Ruling* also allows state PUCs to depart from a carrier's federal tariff language governing the jurisdictional separations process by permitting states to change percentage interstate usage reports retroactively in a manner uncontested under the tariff.

CompTel is the premier industry association representing competitive telecommunications providers and their suppliers. CompTel's members provide local, long distance, international, Internet and enhanced services throughout the United States. CompTel participated by filing *Reply Comments* in this matter and believes that the *Declaratory Ruling* should be revised by the Commission so that CompTel members can rely on the proper terms of BellSouth's F.C.C. Tariff No. 1. Therefore, CompTel asks that the *Declaratory Ruling* be revised as explained below.

I. THE COMMISSION SHOULD FIND THAT THE TERM "CUSTOMER" AS USED IN BELLSOUTH'S FEDERAL ACCESS TARIFF MEANS ONLY THE ENTITY SUBSCRIBING TO SERVICE UNDER THE TARIFF

This Application for Review raises the issue of the proper interpretation and application of the Commission's Entry-Exit Surrogate ("EES") methodology for computing percent interstate use ("PIU") allocations. In the *Declaratory Ruling*, the WCB concluded that Thrifty Call had correctly determined that the EES methodology was applicable, but that Thrifty Call had not correctly interpreted that methodology. In reaching this conclusion, the WCB

reached a number of intermediate conclusions. Ultimately, however, the WCB adopted an interpretation of the EES methodology that is incorrect and unsustainable.

First, the WCB correctly observed that "the points where the call originates and terminates are more significant than the intermediate facilities used to complete such communications" and that this analysis applies regardless of the number of interexchange carriers that handle a particular call.[1] That conclusion is undoubtedly correct, as is the WCB's observation that jurisdictional allocations are designed to determine to which jurisdiction – interstate or intrastate – a particular call should be allocated.[2]

Next, the WCB also correctly observed that the EES methodology could be applied to Feature Group D traffic; that is, its application is not limited solely to Feature Group A and Feature Group B traffic.[3] The WCB also correctly observed that "[w]ith many access services, such as those that provide automatic number identification ("ANI") capability, jurisdiction is readily determined."[4]

Had the WCB stopped there and forthrightly held – as it implicitly assumed[5] – that the jurisdiction-identifying information on the calls in question was present and, based on

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1 *Declaratory Ruling*, ¶ 15.

2 *Id.*, ¶ 8.

3 *Declaratory Ruling*, ¶¶ 14-15.

4 *Id.*, ¶ 9.

5 The WCB appears to assume that the actual origination of the point *was* in fact *known*. For example, the WCB asserts that:

> The fact that the calls at issue were routed through an intermediary switch in Georgia is immaterial to the jurisdiction of a call. *Thrifty Call should have reported* all calls where both the calling party and the called party were located in the same state as intrastate calls and should have reported all calls where the calling party was located in one state and the called party was located in another state as interstate calls.

Declaratory Ruling, ¶ 15 (emphasis added).

that information, Thrifty Call should have reported those calls as intrastate, then there would be no matter of proper tariff interpretation to bring to the Commission.

Unfortunately, the WCB did not do so. Instead, the WCB erred by concluding that the EES methodology applied, and then concocting an interpretation of that methodology that is squarely inconsistent with 15 years of Commission precedent and the unambiguous language of BellSouth's interstate access tariff. In this regard, it bears repeating that, under Commission precedent and the unambiguous language of the BellSouth interstate access tariff, if the actual origination point of the call were known, then the EES methodology *never comes into play*.[6]

In its *Declaratory Ruling*, the WCB concluded that the EES methodology applied – which necessarily assumes that the actual origination point of the call was unknown – but then concluded that:

> Thrifty Call incorrectly used as the point of entry the state in which the call entered Thrifty Call's network, rather than, as intended

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Further support for this belief is found in the WCB's observation that:

> It is noteworthy that Thrifty Call did not apply a consistent methodology to determine the jurisdiction of its calls. Thrifty Call admitted that in Georgia *it used the originating and terminating points of the calls* to determine their jurisdiction rather than treating 100 percent of the calls as intrastate due to the use of Thrifty Call's Georgia-based switch in routing the calls.

Declaratory Ruling, ¶ 15, n.51 (emphasis added).

The WCB's conclusion necessarily assumes that *Thrifty Call* knew the actual location of the calling party. Otherwise, Thrifty Call could not have reported its North Carolina calls in the manner the WCB suggests was proper.

CompTel/ASCENT takes no position on the facts of the Thrifty Call case except to observe that, if the WCB's implicit assumption was correct and supposed on the record – namely that the actual originating location of the calling party was known – then the EES methodology was not applicable in the first instance. If that, in fact, were the case, the WCB should have said so.

6 *BellSouth Tariff F.C.C. No. 1.*

> under the EES methodology, the state in which the call left the originating LEC's network and entered the IXC network.[7]

The WCB's interpretation is flatly wrong and the unambiguous language of the BellSouth interstate access tariff compels an entirely different conclusion. BellSouth's interstate access tariff itself first defines a "Customer" as:

> Any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity *which subscribes to the services offered under this tariff,* including both Interexchange Carriers (ICs) and End Users.[8]

This definition makes clear that the "Customer" is the entity which subscribes to the Bellsouth service, and no one else. Further, to the extent the provision is deemed unclear, it is to be read in the light most favorable to the purchaser of services.[9]

The tariff goes on to specify that, when the actual origination and termination of the call is unknown,

> 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 . . . 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 . . . is situated is an interstate communication.

The Commission has directed the ILECs to include this provision in their tariffs *as a substitute for the unknown origination point*; that substitute is the first location known to the ILEC's access *customer* – the point at which the call enters that customer's network. The call is then treated for

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7 *Declaratory Ruling*, ¶ 16.

8 *BellSouth Tariff F.C.C. No. 1*, p. 2-55 (effective Dec. 16, 1996). The tariff does not include a definition for the term "customer network" nor does BellSouth define the "point of entry."

9 *Commonwealth of Virginia State Corp. Commission v. MCI Tel. Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 10,583, ¶ 20 (2000) (recognizing that "to the extent that there is an ambiguity . . . it is construed against MCI as the drafter of the Tariff.") (citing *Halprin, Temple, Goodman, & Sugrue v. MCI Tel. Corp.*, 13 FCC Rcd 22,568 at ¶ 13 (1998)).

jurisdictional purposes as though it originated at that network entry point. This has been the plain language understanding of the EES methodology and the ILEC's implementing tariff language for 15 years.

In this case, it is undisputed that *Thrifty Call* was BellSouth's access customer. It is also undisputed that no other IXC purchased access services from BellSouth with respect to the calls at issue. Thus, the tariff cannot be rationally interpreted as meaning other than that the point of entry was the point at which the call entered *Thrifty Call's* network. The WCB's conclusion to the contrary is incorrect as a matter of law.

Moreover, if allowed to stand as written, the holding of the *Declaratory Ruling* is a major modification of the EES methodology without following proper administrative law procedures. And a very bad one at that. The EES method was created to apply when a carrier purchasing access services did not know the origination point of a call. In such cases, the carrier was instructed to use a surrogate for that origination point, namely the location where the call first entered that carrier's network. There were thus two possible origination points for a call – the actual origination point, if known, or the point at which the call entered the network of the access purchaser, if the actual point of origination is unknown. The *Declaratory Ruling* has now essentially created a third possibility, namely where the call entered the network of some other IXC before reaching the network of the carrier purchasing access. Under the WCB's logic, in those cases, the final IXC is supposed to make PIU reports based on where the call entered *another carrier's* network. This is outside the scope of the EES policy and the BellSouth tariff, and is extremely impractical.

The implications for IXCs are extreme, as under this new policy they will be required to inquire of any other IXC handling a call before they receive it as to the origination

point of the call. And as the Commission well knows, in today's telecom environment, calls often pass through multiple carriers, including Internet backbone companies, before reaching their final termination point. It is extremely frightening and daunting to think that carriers purchasing access who receive calls from other IXCs without originating information are now obliged to search out originating detail about those calls beyond the point at which they receive it. In many cases the terminating IXC may not even know who to ask, let alone have the resources to devote to researching each such call. This requirement is an impossibility on its face.[10]

The current EES method was created after much deliberation by a Federal-State Joint Board and was based on a balancing of interests and hardships between the IXCs purchasing access and the ILECs selling access services. Within that context, a system was created that required IXCs to file PIU reports with the ILECs and to base those reports on a simple surrogate methodology which relies on substitution of the point of entry into the reporting IXC's network as the point of origin when the actual point is unknown. The *Declaratory Ruling* radically changes this balance by requiring IXCs now to research every call where originating call detail is missing to try and identify that state of origin. This is not the law today, and is not within the WCB's power to create without a rulemaking. It should be reversed by the Commission.

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[10] It is important to recognize that this proceeding does not present the question of the consequences of manipulating or deleting ANI information from the call stream. To the extent that this may or may not occur, the Commission will need to decide the proper response to such activity. This proceeding does not present that opportunity to the Commission.

II. THE COMMISSION SHOULD REVERSE THE *DECLARATORY RULING'S* ERRONEOUS RULING PERMITTING STATE PUCS TO RETROACTIVELY REVISE PIU CALCULATIONS

The *Declaratory Ruling* declined to rule on Thrifty Call's request in connection with BellSouth's backbilling of access charges. In so doing, it permitted to stand a North Carolina Utilities Commission ruling awarding BellSouth damages for unpaid intrastate access charges based on a revision to the PIU retroactively for an extended period. This ruling was based on a misapplication of the Communications Act and the BellSouth tariff and must be reversed. If allowed to stand, the *Declaratory Ruling* abdicates federal authority over jurisdictional separations processes to the states.

BellSouth's interstate access tariff states that PIU's that are adjusted from the original carrier reports "shall be applied to the usage for the quarter the audit is completed, the usage for the quarter prior to the completion of the audit, and the usage for the two (2) quarters following the completion of the audit."[11] In the Thrifty Call case, there was no audit and the WCB declined to rule on retroactivity, simply stating that "it is within the North Carolina commission's jurisdiction to determine whether BellSouth provided sufficient evidence to prove its backbilling amount."[12] This statement is incorrect.

Any backbilling for intrastate access can only occur *after* a retroactive PIU adjustment. And PIU adjustment is solely a federal matter, as the Commission has often recognized.[13] Importantly, the relevant BellSouth interstate tariff provision refers to PIU adjustments, not to backbilling. It has been longstanding FCC policy to forbid retroactive

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11 *BellSouth F.C.C. No. 1*, § 2.3.10(D)(1).

12 *Declaratory Ruling*, ¶ 27.

13 *See, e.g.*, 47 U.S.C. § 410; *In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, 4 FCC Rcd 1966 (Feb. 27, 1989).

revisions to PIUs of more than a very limited timeframe. The federal tariff provision which permits backward-looking PIU revisions for a maximum of two quarters was the subject of much debate and discussion before it was allowed to take effect.[14] Again, this policy was based on the careful balancing of interests between access purchasing IXCs and access selling ILECs in the jurisdictional separations process which is under *exclusive* FCC jurisdiction.[15]

Billing – and backbilling – can only occur after the PIU has been determined. And the PIU can be determined only pursuant to federal law and FCC tariffs. Therefore, any revision in access bills based on revised PIUs can only be accomplished for the period within which FCC policy and prescribed interstate tariffs permit retroactive PIU revision. Any inconsistent intrastate tariff – or PUC ruling – which permits a different PIU calculation has been preempted by the FCC in its Orders adopting the PIU methodology and in the ILEC implementing tariffs prescribed by the FCC. Therefore, it is wholly incorrect to state, as did the *Declaratory Ruling*, that backbilling is solely a state matter.

In view of the federal tariff limitation of two prior quarters for PIU revisions, ILECs will be permitted double recovery for state adjustments made further in arrears. Any change in the state PUC billing *necessarily* brings a concomitant change in federal billing because the two are each separate portions of the same whole. As the state element goes up, the federal part comes down equally. Thus, by permitting the state PUCs to revise the PIU backward for four years, and allow backbilling accordingly, the *Declaratory Ruling* looks the other way while the ILECs receive double recovery. The ruling should be reversed and a finding made that

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14 *See In the Matter of BellSouth Telecommunications, Inc.*, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 73 and 93 (Feb. 22, 1993).

15 It should not be heard that this tariff provision limiting retroactive PIU revisions does not apply where there was no PIU audit. In fact, this provision is the *only* reference in the tariff to PIU revisions of any sort. If it does not apply, then no retroactive revision of PIU is permissible.

PIU revisions may only be made consistent with federal policy and their implementing federal tariffs.

III. CONCLUSION

For the reasons stated above, the Commission should review and reverse these portions of the *Declaratory Ruling*.

Respectfully submitted,

CompTel/ASCENT

By _____

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