

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.

DOCKET NO. 000475-TP
ORDER NO. PSC-08-0340-PCO-TP
ISSUED: May 28, 2008

ORDER DENYING AT&T FLORIDA'S MAY 7, 2008, MOTION TO COMPEL

I. Case Background

On April 21, 2000, BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) filed a complaint against Thrifty Call, Inc. (Thrifty Call). AT&T Florida alleges that Thrifty Call intentionally and unlawfully reported erroneous Percent Interstate Usage (PIU) factors to AT&T Florida in violation of AT&T Florida's Intrastate Access Tariff and the rules and regulations established by the Commission. AT&T Florida alleges that erroneous PIUs have resulted in the under reporting of intrastate access terminating minutes to AT&T Florida, causing AT&T Florida financial harm.

On August 20, 2001, Thrifty Call filed a Motion to Stay or in the Alternative, to Bifurcate the Proceedings. On August 28, 2001, Order No. PSC-01-1749-PCO-TP was issued, establishing procedure. On September 4, 2001, AT&T Florida filed its Opposition to Thrifty Call's Motion to Stay or in the Alternative, to Bifurcate the Proceedings. On November 21, 2001, Order No. PSC-01-2309-PCO-TP was issued, granting Thrifty Call's Motion to Stay.

On July 20, 2005, AT&T Florida filed a Motion to Lift Stay and Establish Procedural Schedule. On November 2, 2005, Order No. PSC-05-1100-PCO-TP was issued, granting AT&T Florida's Motion to Lift Stay and Establish Procedural Schedule. On December 28, 2007, Order No. PSC-07-1027-PCO-TP was issued, modifying procedure.

On May 5, 2008, AT&T Florida filed a Motion to Compel Thrifty Call to respond to certain discovery requests. On May 7, 2008, AT&T Florida filed another Motion to Compel Thrifty Call to respond to certain discovery requests. On May 12, 2008, Thrifty Call filed its Response in Opposition to AT&T Florida's May 5, 2008, Motion to Compel. On May 14, 2008, Thrifty Call filed its Response in Opposition to AT&T Florida's May 7, 2008, Motion to Compel.

II. AT&T Florida's Motion to Compel, filed May 7, 2008

In its motion, filed May 7, 2008, AT&T Florida seeks to compel Thrifty Call to respond to its Fifth Request for Production of Documents, Nos. 32-44 (disputed discovery requests). Thrifty Call objects to the disputed discovery requests on the following grounds: relevance,

DOCUMENT NUMBER-DATE

04489 MAY 28 08

FPSC-COMMISSION CLERK

unduly burdensome and overly broad. AT&T Florida first argues that the disputed discovery requests are clearly relevant as summarized below.

Requests for Production, Nos. 32-39 refer to a rebuttal statement and discovery response made by Thrifty Call's witness, Timothy Gates. The statement dealt with how incorrectly jurisdictionalized traffic was, at least in part, a function of technology at the time and the clients of Thrifty Call, and the discovery response identified those clients as MCI and Worldcom. According to AT&T Florida, Requests for Production, Nos. 32-39 were specifically designed to discover Thrifty Call's contractual relationship with its clients during the relevant time period; how Thrifty Call billed its clients during the relevant time period; Thrifty Call's relationship with its two primary customers, MCI and Worldcom; the agreements between the companies during the relevant time period; and any correspondence by and between Thrifty Call and MCI and Worldcom regarding a specific agreement.

Requests for Production, Nos. 40-41 also refer to certain discovery responses made by Thrifty Call. According to AT&T Florida those responses indicated that it was Thrifty Call's corporate policy to block the delivery of calling party information for all calls carried on its network and that MCI and Worldcom had requested the same. According to AT&T Florida, Thrifty Call also stated that it utilized regulatory experts, Jerry James and Martha Smiley, to assess whether it could lawfully block the delivery of calling party information to which it was advised by the experts it was lawful to do so. Requests for Production, Nos. 40-41 were specifically designed to discover the documents that formed the basis for Thrifty Call's decision that it was permitted to block the delivery of calling party information on its network.

Requests for Production, Nos. 42-44 were designed to obtain any documents that Thrifty Call identified in its responses to interrogatories and the documents which Thrifty Call and its witnesses reviewed, relied upon, support, evidence, pertain, or otherwise relate to Thrifty Call's responses to AT&T Florida's Interrogatories and Requests for Admission served concurrently with its Request for Production of Documents.

In terms of the disputed discovery requests being unduly burdensome or overly broad, AT&T Florida cites to case law, arguing that Thrifty Call's failure to quantify such objections alone warrants overruling the objection.¹ Further, AT&T Florida asserts that, in any case, the disputed discovery requests are not over broad and narrowly tailored to the issues in the case.

In summary, AT&T Florida argues that Thrifty Call's objections are an attempt to play "keep away" with the facts. The information sought by the disputed discovery requests is relevant, reasonably calculated to lead to the discovery of admissible evidence, not ambiguous, vague, or overly broad. AT&T Florida is in need of the information requested to properly prepare its case for hearing. Further, AT&T Florida attempted to contact Thrifty Call on the

¹ AT&T Florida includes the following citation and parenthetical: *First City Development of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc.* 545 So. 2d 502, 503 (Fla. 4th DCA 1989) ("it is incumbent upon [the objecting party] to quantify for the trial court the manner in which such discovery might be overly broad or burdensome. They must be able to show the volume of documents, or the number of man-hours required in their production, or some other quantitative factor that would make it so.").

matter; however, Thrifty Call was unavailable and did not respond prior to the filing of the motion.

III. Thrifty Call's Response in Opposition to AT&T Florida's May 7, 2008, Motion to Compel

In its response, Thrifty Call asserts that AT&T Florida's May 7, 2008, Motion to Compel is not timely. Specifically, while Thrifty Call has timely filed all objections and responses to AT&T Florida's voluminous discovery requests, AT&T Florida waited over two weeks to move to compel responses thereby failing to complete its discovery before the discovery cutoff date. Thrifty Call argues that if AT&T Florida was truly in need of the information requested to properly prepare its case, it would have and should have filed its Motion to Compel in a timely manner. Thrifty Call points out that the amended discovery cutoff date of May 5, 2008, had passed and that the case is scheduled for prehearing in six days and for hearing in 27 days. Thrifty Call argues that AT&T Florida's complaint was filed in April 2000, and that AT&T Florida has had every opportunity since then to ask questions to which it now seeks answers to in its untimely Motion to Compel. Thrifty Call asserts that Florida courts have recognized that when a party has not been diligent in seeking discovery, the court is free to deny motions to compel.

Thrifty Call also argues that the disputed discovery requests are unduly burdensome. Thrifty Call asserts that although discovery can cover a wide range of materials, it does have certain limits such that it cannot be utilized to explore all the minute details of a controversy or to delve into immaterial or inconsequential matters. Nor can discovery be so unduly burdensome upon a party so as to be oppressive. Thrifty Call points to the fact that, as of 2000, it has no longer been an active business, a fact that AT&T Florida has been aware of. There are no active officers of the organization such that Thrifty Call has no easy access to any business records, to the extent that they still exist. Additionally, considerable time and expense would be incurred to travel to where the records may be and to search for and compile the voluminous materials sought. The only former corporate officer even remotely involved in this dispute, Harold Lovelady, currently resides in Costa Rica, and any documents requested in AT&T Florida's Requests for Production of Documents, Nos. 34-44, to the extent any of them exist, are in a warehouse in Texas. AT&T Florida is aware of these facts. Thrifty Call argues that to require Harold Lovelady to interrupt his normal current business in order to travel to Texas in an attempt to identify and obtain the information requested would involve great time and expense. To do so to assist AT&T Florida to obtain materials requested in an untimely motion to compel is so unduly burdensome so as to be oppressive.

Thrifty Call argues that because it is no longer an active corporation and is without a records custodian, it should not be forced to undertake the financial burden required to respond to these requests, even though some or all of such expense may ultimately be assessed and recovered as costs. Further, if Thrifty Call is required to produce the documents requested, the time necessary to do so would, in all likelihood, force a delay of the hearing currently scheduled for June 10, 2008. As such, AT&T Florida's Motion to Compel, filed May 7, 2008, should be denied.

IV. Ruling

Rule 1.350, Florida Rules of Civil Procedure, governs discovery requests for production of documents and states in subpart (a) that “[a]ny party may request any other party (1) to produce . . . any designated documents . . . that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed . . .” Subpart (b) which governs procedure goes on to state that the “party submitting the request may move for an order under rule 1.380 concerning any objection, failure to respond to the request, or any part of it . . .”

The disputed discovery requests listed in AT&T Florida’s May 7, 2008, Motion to Compel are its Fifth Set of Requests for Production of Documents, Nos. 32-44, which were served on Thrifty Call on April 8, 2008. Thrifty Call served its objections to these requests on April 18, 2008. Thrifty Call then served its responses to these requests on April 23, 2008. Thrifty Call’s response for each Request for Production of Documents, Nos. 32-44 is the following:

There are no additional responsive documents currently in Thrifty Call’s possession other than what Thrifty Call has already provided in this docket.

These responses alone constitute grounds for denying AT&T Florida’s Motion to Compel, filed May 7, 2008. According to the rules, it is appropriate for the party making the request for production of documents to move to compel responses to such requests only when the party to whom the requests are directed, has either objected or failed to respond to the requests—either entirely or in part. Here, Thrifty Call did respond to the discovery requests at issue, AT&T Florida’s Fifth Set of Requests for Production of Documents, Nos. 32-44, such that AT&T Florida is not in a position to properly move to compel responses in the manner that it did.

Thrifty Call does assert, however, that, to the extent any of the requested documents exist, they would be in a warehouse in Texas. However, because Thrifty Call has not been in business since 2000 and the only former officer involved in this dispute resides in Costa Rica, it is highly likely that a considerable amount of both time and expense would be incurred in any attempt to identify and obtain the information requested. Thus, it appears that requiring Thrifty Call to do so would be unduly burdensome.

Because the disputed discovery requests have been responded to and because any further production of documents in the given circumstances appears to be unduly burdensome, the issues of the motion’s timeliness and whether the disputed discovery requests are relevant to the proceeding at hand, need not be considered here.


As stated above, the fact that Thrifty Call responded alone constitutes grounds for denying AT&T Florida’s Motion to Compel. Notwithstanding this position, however, it has also been established that requiring Thrifty Call to respond any further would appear to be an unduly

burdensome request. Therefore, because Thrifty Call did serve a response to each of the disputed discovery requests and because requiring any further response would be unduly burdensome on Thrifty Call, AT&T Florida's Motion to Compel, filed on May 7, 2008, is hereby denied.

Based on the foregoing, it is therefore

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that AT&T Florida's Motion to Compel, filed May 7, 2008 is hereby denied.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 28th day of May, 2008.


LISA POLAK EDGAR
Commissioner and Prehearing Officer

(S E A L)

CCP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:
1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida

ORDER NO. PSC-08-0340-PCO-TP

DOCKET NO. 000475-TP

PAGE 6

Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.