BELLSOUTH

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December 6, 2001

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Complaint of BellSouth Telecommunications, Inc. Regarding the Practices of Global Crossing Telecommunications, Inc. in the Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Services*
Docket No. 01-00913

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of 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. Copies of the enclosed are being provided to counsel for Global Crossing.

Cordially,

Joelle Phillips

JP/jej

Enclosure

423498

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Complaint of BellSouth Telecommunications, Inc. Regarding the Practices of Global Crossing Telecommunications, Inc. in the Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Services*

Docket No. 01-00913

BELLSOUTH'S 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

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 the Authority dismiss BellSouth's Complaint on a number of grounds. In the alternative, Global Crossing requests that the

Authority 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 Tennessee. 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 primarily 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 the Tennessee Regulatory Authority (the "Authority"). 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 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 the Authority. 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 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 Nashville 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 Nashville to Memphis is intrastate and is normally governed by intrastate access tariffs. However, if a long distance carrier receives the call to Memphis 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 the Authority 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 this dispute.

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 through 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 released April 16, 1985, Re MCI Telecommunications Corp. While

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[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."

Tel-America is 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 the same state 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:

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[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.

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 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 asserts 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 Florida Public Service 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]

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[3] In Order No. PSC-01-2309-PCO-TP, the Florida 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

Next, in another futile attempt to circumvent the well-settled principle that the Authority 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 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.

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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.

II. 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 Authority Has the Authority to Resolve BellSouth's Complaint.

Global Crossing contends that the Authority does not have the jurisdictional authority to resolve BellSouth's Complaint. Global Crossing premises this argument on the principle that the Authority 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 Authority to find that Global Crossing misreported its PIU factor and to enforce BellSouth's intrastate tariff by requiring Global Crossing to pay BellSouth all intrastate access charges owed. Effectively, what Global Crossing is arguing is that the Authority is powerless to hear disputes regarding BellSouth's intrastate tariff. Nothing can be farther from the truth.

Pursuant to T.C.A. § 65-4-117, the Authority has the power to investigate upon its own initiative or upon complaint in writing, any matter concerning any public utility. Moreover, the Authority has the power pursuant to T.C.A. § 65-5-201 to fix rates and to approve tariffs. The Authority has a well-established

practice of hearing complaints between telecommunications companies and has, pursuant to T.C.A. §§ 65-2-102 and 103, promulgated procedures for the adjudication of complaints. Recently, pursuant to the same statutory authority, the Authority has proposed specific rules for handling complaints between telecommunications carriers. Global Crossing is arguing that the Authority lacks the power to hear the complaints governed by such rules. BellSouth's Complaint is similar to complaints filed by CLECs against BellSouth for the alleged failure to pay reciprocal compensation for the delivery and termination of ISP-bound traffic. In those proceedings, the Authority has required BellSouth to comply with the provisions of its Authority-approved contract and pay the CLECs reciprocal compensation for ISP-bound traffic. *See, e.g., Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth,* Docket No. 99-00662. Similarly, in this case, BellSouth seeks an order requiring Global Crossing to comply with BellSouth's Authority-approved tariff.

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

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 a customer 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 customer to provide the data the customer 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 Authority action. Stated simply, Global Crossing argues that "may" means "must." Obviously, "may" means "may."

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 Authority 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 Authority.

Other state commissions have rejected the very arguments presented by Global Crossing. For example, 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 Tennessee, 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 Florida 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 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.

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[4] In Order No. PSC-00-2081-PCO-TP, the Florida 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.

III. BELLSOUTH'S CLAIMS ARE NOT TIME BARRED.

Global Crossing asserts that BellSouth's claims are time barred by the terms of the tariff. Global Crossing argues that the tariff provision limits retroactive billing to at most a one calendar quarter. *See* Global Crossing Motion at 16. 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.

IV. THE AUTHORITY SHOULD NOT DEFER TO GLOBAL CROSSING'S FEDERAL COURT SUIT.

Global Crossing requested that the Authority 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 the 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 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, 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.[5]

CONCLUSION

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

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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(615) 214-6301

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New Orleans, Louisiana 70130

[5] BellSouth attaches its Motion to Dismiss and supporting Memorandum as Exhibit "D."

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[ ] Mail
[✓] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
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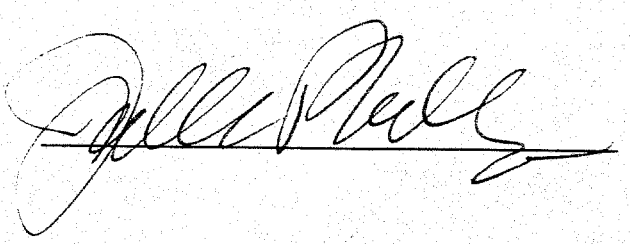


EXHIBIT "A"

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. Thrifty Call, Inc., Respondent.	)	RECOMMENDED ORDER RULING ON COMPLAINT

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

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

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

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

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

FOR THRIFTY CALL, INC.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDING OF FACT

1. Thrifty Call 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.

---

[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.

EXHIBIT "B"

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

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

pb001301.04

EXHIBIT "C"

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.

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

mz062300 07

EXHIBIT "D"

UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation,

Defendant.

Civil Action No.: 1:01-CV-2706 MHS

DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant BellSouth Telecommunications, Inc. ("BellSouth") moves pursuant to Rules 12(b)(6) and/or 12(b)(1) of the Federal Rules of Civil Procedure to dismiss Plaintiff Global Crossing Telecommunications, Inc.'s ("Global Crossing") Complaint. In support of this Motion, BellSouth relies upon Global Crossing's Complaint and BellSouth's Memorandum of Law, filed concurrently herewith.

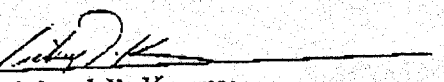
BellSouth respectfully submits that Plaintiff's Complaint should be dismissed for three independent reasons. ***First***, the claims lie within the exclusive

and/or primary jurisdiction of the state public service commissions. ***Second***, under the Johnson Act, 28 U.S.C. § 1342, there is no federal court jurisdiction over Plaintiff's claims and thus they should be dismissed with prejudice. ***Third***, adjudication of Plaintiff's claims in federal court would pose an institutional threat to proper state regulatory schema and therefore should be dismissed pursuant to the *Burford* abstention doctrine.

BellSouth respectfully requests a hearing before the Court on this Motion.

Respectfully submitted this 30th day of November, 2001.

ALSTON & BIRD LLP



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Attorneys for Defendant BellSouth Telecommunications, Inc.

One Atlantic Center
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT has been sent to counsel for Global Crossing Telecommunications, Inc. as follows:

VIA HAND DELIVERY
Richard L. Robbins, Esq.
Sutherland Asbill & Brennan LLP
999 Peachtree Street, N.E.
Atlanta, Georgia 30309

VIA FACSIMILE AND
FIRST CLASS U.S. MAIL,
POSTAGE PREPAID
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Vienna, Virginia 22182

VIA FIRST CLASS U.S. MAIL,
POSTAGE PREPAID
Michael J. Shortey, III, Esq.
Global Crossing North America, Inc.
180 South Clinton Avenue
Rochester, New York 14646

This 30th day of November, 2001.

Michael P. Kenny

UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation,

Defendant.

Civil Action No.: 1:01-CV-2706

DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. SUMMARY OF ARGUMENT

Defendant BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits that Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) and/or 12(b)(1) of the Federal Rules of Civil Procedure for three independent reasons. ***First***, the claims lie within the exclusive and/or primary jurisdiction of the state public service commissions. ***Second***, under the Johnson Act, 28 U.S.C. § 1342, there is no federal court jurisdiction over Plaintiff's claims. ***Third***, adjudication of Plaintiff's claims in federal court would pose an institutional threat

to proper state regulatory schema and therefore should be dismissed pursuant to the *Burford* abstention doctrine.

II. FACTUAL BACKGROUND

Plaintiff, Global Crossing Telecommunications, Inc. ("Global Crossing"), is an interexchange carrier ("IXC") that provides intrastate and interstate long-distance service to customers in various states. Compl. ¶ 1. IXCs are dependent on the networks of local exchange companies ("LECs"), such as BellSouth, in order to have access to their customers. Compl. ¶ 2. A typical long-distance telephone call originates on one LEC's network, passes through one or more IXC facilities, and then terminates on the network of a LEC (which may be the same company on whose network the call originated). *See, e.g.*, Compl. ¶ 6. The use of LEC facilities to complete long-distance telephone calls is referred to as "access." *Id.* IXCs pay charges for access both to the LEC on whose network the call originated ("originating access charges") and to the LEC on whose network the call terminated ("terminating access charges"). *See* Compl. ¶¶ 6,7.

Pursuant to various intrastate and interstate tariffs, BellSouth provides Global Crossing with access service in Alabama, Georgia, Florida, Louisiana,

Mississippi, North Carolina, South Carolina, and Tennessee (the "States").[1] The access charge for an intrastate long-distance call is set by BellSouth's tariffs on file with and approved by the state public service commissions in the States (collectively, "BellSouth's State Access Tariffs"). An intrastate call is one that originates within the same state as the called station.[2] BellSouth's intrastate access charges are generally higher than its interstate access charges.[3] Compl. ¶ 7.

BellSouth bills IXCs like Global Crossing according to its percentage of interstate use ("PIU"). *See* Compl. ¶ 7. Until recently, BellSouth could not, with its own equipment, determine the terminating PIU ("TPIU"), one of the PIU factors, for an IXC; instead, the individual IXCs, such as Global Crossing, had to report their TPIU to BellSouth. *See* Compl. ¶ 7. This reporting requirement is set

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[1] Global Crossing's Complaint does not specify the particular states at issue but references only three of the states where BellSouth provides Global Crossing access service: Georgia, Florida, and North Carolina. Compl. ¶ 5. To the extent that the Complaint is limited to preventing BellSouth's recovery of intrastate access charges in these three states, BellSouth's Motion to Dismiss is so limited. Out of an abundance of caution, however, BellSouth also directs its Motion and Memorandum of Law in Support to additional states where BellSouth provides Global Crossing service and also seeks recovery for underpaid intrastate access services: Alabama, Louisiana, Mississippi, South Carolina, and Tennessee.

[2] *See* Sections E2.3.14(A) and (B) of BellSouth's State Access Tariffs (Section E2.3.10 of the Alabama Tariff). This Court may properly consider these tariffs in connection with this Motion to Dismiss because they are matters of public record and are relied upon in Global Crossing's Complaint. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1071 (5th Cir. 1996); *Atlanta Gas Light Co. v. S. Natural Gas Co.*, 338 F. Supp. 1039, 1041 (N.D. Ga. 1972), *aff'd in relevant part and vacated in part*, 476 F.2d 142 (5th Cir. 1973).

[3] 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"). Compl. ¶ 5.

forth in Sections E2.3.14(A) and (B) of BellSouth's State Access Services Tariffs (Section E2.3.10 of the Alabama Tariff). BellSouth relied on the accuracy of Global Crossing's reports to calculate the amounts due and owing from Global Crossing for terminating access services. Compl. ¶ 7.

Recently, BellSouth installed a new computer system that enables BellSouth to determine the PIU for each IXC. *See* Compl. ¶ 14. As a result, BellSouth determined that Global Crossing had misreported its PIU, and underpaid its intrastate access charges. *Id.* Accordingly, BellSouth demanded payment from Global Crossing for underreported intrastate usage. *See* Compl. ¶ 15.

In a peremptory strike, Global Crossing brought suit in this Court. In five separate counts, Global Crossing seeks declaratory judgments that "BellSouth's refusal to use an independent audit in order to determine the accuracy of Global Crossing's jurisdictional separation of interstate and intrastate telephone service is unlawful" (**Count I**); that "BellSouth's calculation of Global Crossing's jurisdictional separation of interstate and intrastate telephone calls is erroneous" (**Count II**); that BellSouth cannot recover for unpaid access charges beyond one year (**Count III**); nor beyond two years (**Count IV**); and that BellSouth may not modify the PIU factors reported by Global Crossing (**Count V**). In addition,

Global Crossing seeks injunctions prohibiting the conduct that it requests the Court to declare unlawful (Counts I, III, IV, and V).

Because Global Crossing has underreported and underpaid its intrastate usage in various states, BellSouth filed actions in the eight relevant public service commissions (the "State Commissions") in October 2001.[4]

III. ARGUMENT AND AUTHORITY

A. Applicable Rule 12(b) Standards

A complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) when, "on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Under Federal Rule 12(b)(1), a complaint, upon factual attack, may be dismissed when a court determines that it lacks subject matter jurisdiction irrespective of the pleadings. *McMaster v. U.S.*, 177 F.3d 936, 940 (11th Cir. 1999) ("[F]actual attacks challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings and matters outside the pleadings. . .").

[4] A list of the State Commission proceedings is attached as Exhibit "A."

B. BellSouth's State Access Tariffs Govern Plaintiff's Claims

This case is about BellSouth's contention that Global Crossing has underpaid BellSouth intrastate access charges. Because Global Crossing purchases local access from BellSouth for both interstate and intrastate traffic, its access service must be identified as either interstate or intrastate. *See* BellSouth's State Access Tariffs. Once the access is assigned to the appropriate category, charges are separately regulated under the dual regulatory regime prescribed by the Communications Act of 1934. *See* 47 U.S.C. §§ 151, 152(b); *LDDS Communications, Inc. v. United Tel. of Fla.*, 15 F.C.C. Record 4950, 4951 (adopted March 7, 2000; released March 8, 2000) (hereinafter, "*LDDS*"). Thus, "the two categories of traffic are regulated along two separate but parallel tracks by independent agencies – the FCC for interstate communications and the appropriate state commission for intrastate communications." *LDDS*, 15 F.C.C. Record at 4951.

Here, the issue is whether Global Crossing overreported its interstate access, and thereby underreported and underpaid its intrastate access, which it had a financial incentive to do. *See id.* at 4952 (Because of the rate difference, IXCs have "an incentive to overstate their percentage of interstate use, thereby reducing the fraction of their total traffic that was subject to the higher, intrastate access

rates"). Although intrastate access charges are the issue, Global Crossing nevertheless alleges that this is a federal matter because the interstate tariffs govern both the jurisdictional separation of traffic and the process for challenging that separation and the payment owed thereunder. Compl. ¶ 20. The BellSouth intrastate and interstate tariffs have similar provisions regarding jurisdictional separation; accordingly, one state commission has already exercised jurisdiction over this very issue to uphold BellSouth's method of jurisdictional separation.[5]

In the *LDDS* case, the FCC rejected the argument that the process for disputing recovery of intrastate access charges based on jurisdictional separation of traffic is governed by the interstate tariff. 15 F.C.C. Record at 4950. In that case, United (the local exchange carrier), concluded that LDDS (the IXC) had misreported its PIU factor by underreporting its intrastate usage and overreporting its interstate usage. United backbilled LDDS for the resulting difference in access

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[5] *See* Recommended Order Ruling on Complaint, *In the Matter of BellSouth Telecomms., Inc. v. Thrifty Call, Inc.*, N.C. Utils. Comm'n Docket No. P-447, Sub 5, April 11, 2001 (hereinafter *"Thrifty Call Order"*) (finding that intrastate usage of minutes were misreported and holding that "it does not matter which tariff is used to arrive at the TPIU. The conclusion is the same."). A copy of this Recommended Order is attached as Exhibit "B." 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 Telecomms., Inc. v. Thrifty Call, Inc.*, N.C. Utils. Comm'n Docket No. P-447, Sub 5. A copy of the Final Order is attached as Exhibit "C." On August 7, 2001, Thrifty Call filed a petition for declaratory ruling with the FCC, raising the same issues resolved by the NCUC in this matter. BellSouth has opposed this petition. The FCC has not yet issued a ruling.

charges. LDDS filed a complaint with the FCC alleging that United's actions violated United's FCC tariff. United, however, argued that the backbilling was for underpayment of intrastate access charges that were governed by United's intrastate tariff, which expressly permitted back-billing. The FCC concluded that the dispute focused on intrastate access service:

> This raises the questions of which of these two related, but separate, transactions it is that LDDS challenges in this action. *There can be little question that the focus of LDDS's claim is on the calculation of its liability for intrastate access service. LDDS does not challenge the credit it received in connection with the recalculation of its interstate access bill. Rather, it objects to the retroactive increase in liability for intrastate access. . . . Although this commission unquestionably would have the authority to decide issues arising under United's federal tariff, we conclude that LDDS's complaint, fairly read, presents no such issues.*

Id. at 4955 (emphasis added).

As in *LDDS*, the focus of Global Crossing's Complaint is that BellSouth is allegedly overcharging it for intrastate access. These intrastate charges are calculated pursuant to the BellSouth State Access Tariffs. *See id.* ("In calculating the new intrastate access charges, United applied the terms of its intrastate tariff to the revised figure of intrastate minutes of use."). Thus, under the "dual-track system, this transaction falls squarely within the jurisdiction of the [State] PSC[s]. . . ." *Id.*

The decision in *LDDS* is consistent with decisions in numerous state commissions holding that they have jurisdiction to resolve similar disputes over PIU reporting and intrastate access charges. For example, the North Carolina Utilities Commission recently resolved a virtually identical dispute between BellSouth and another IXC.[6] State commissions have presided over PIU calculation issues in the negotiation and arbitration of interconnection disputes.[7] They have also decided PIU reporting issues,[8] provided penalties for false PIU reporting,[9] and handled commission complaints regarding inaccurate PIU reporting.[10]

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[6] *See Thrifty Call Order*, Exh. B.

[7] *See, e.g., In re Sprint Communications Co. L.P.*, No. 96-1001-TP-ARB, 1996 WL 768942 (Ohio Pub. Util. Comm'n Dec. 20, 1996).

[8] *See, e.g., In re US West Communications, Inc.*, No. P-421/EM-93-405, 1994 WL 91225 (Minn. Pub. Util. Comm'n Feb. 22, 1994); *In re Cent. Tel. Co.*, No. 9981, 1993 WL 595464 (Tex. Pub. Util. Comm'n Sep. 8, 1993); *In re Ala. Pub. Serv. Comm'n Policies Regarding Reporting of PIU*, No. 19356, 1992 WL 208261 (Ala. Pub. Serv. Comm'n Jun. 18, 1992); *In re Investigation of Revenue Requirements*, Nos. U-17949, U-17949-V, 1992 WL 677879 (La. Pub. Serv. Comm'n May 11, 1992). The Florida Public Service Commission, in separate orders over the years, has addressed PIU issues repeatedly, including the PIU reporting requirements. *See In re Elimination of Requirement that LECs File PIU Reports to the Fl. Pub. Serv. Comm'n*, No. 951049-TL, 1995 WL 632457 (Fla. P.S.C. Oct. 17, 1995) (setting out history of Commission regulation of PIU issue).

[9] *In re Amendment of Chapter 280, Provision of Competitive Telecomms. Servs.* No. 96-526, 1996 WL 677619 (Me. Pub. Util. Comm'n Oct. 24, 1996).

[10] *In re Southwest Tex. Tel. Co.*, No. 9983, 1992 WL 487220 (Tex. Pub. Util. Comm'n Aug. 14, 1992).

Based on these authorities, Global Crossing has mischaracterized the basic nature of its state tariff claims in order to avoid the regulatory jurisdiction of the various State Commissions. But, the real substantive focus of Global Crossing's claim, however, is on intrastate access service. For this reason, the Court should see through Global Crossing's transparent attempt at forum shopping and refer this action to the relevant State Commissions.

C. Global Crossing Has Failed to Exhaust Its Administrative Remedies

If a claim is within the exclusive jurisdiction of an administrative agency, a court should defer judicial resolution until available administrative remedies have been exhausted. *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). The statutory schemes in the States provide that the public service commissions have exclusive jurisdiction over Global Crossing's claims. Global Crossing, moreover, has not alleged that it has exhausted its administrative remedies before those commissions.

Each of the States has granted its state utility commission exclusive jurisdiction over the regulation of utility rates and services.[11] Courts in these states

[11] Ala. Code § 37-1-31 (exclusive jurisdiction over rates and services regulations); Fla. Stat. Ann. § 364.01; *Florida Interexchange Ass'n v. Beard*, 624 So.2d 248 (Fla. 1993) (exclusive jurisdiction to regulate telecommunications); O.C.G.A. § 46-2-23; *Ga. Pub. Serv. Comm'n v. Gen. Tel. Co. of Ga.*, 182 S.E. 2d 793, 794 (Ga. 1971) ("Equity courts refuse jurisdiction where an adequate administrative remedy is available and has not been exhausted. The Georgia Public Service Commission was created for a special purpose with special . . . matters including the

have interpreted that jurisdiction broadly.[12] Global Crossing's claims affect BellSouth's intrastate access charges, concern matters regulated by the State Commissions, and require the interpretation of BellSouth's intrastate tariffs. Under the relevant statutes and case law, there is no doubt that Global Crossing's claims should be dismissed because they fall squarely within the exclusive jurisdiction of the State Commissions.

establishment of rates for public utilities."); Miss. Code Ann. § 77-3-5 ("exclusive original jurisdiction over the intrastate business and property of public utilities"); La. Const. Art. V, § 21(B); *Daily Advertiser v. Trans-La*, 612 So. 2d 7, 27 (La. 1993) (Louisiana PSC has exclusive jurisdiction over rate matters); N.C.G.S. § 62-2; *State Utilities Commission v. Thornburg*, 342 S.E. 2d 28, 31 (N.C. 1986) ("The Commission, not the courts, has been given the authority to regulate the rates of public utilities"); S.C. Code Ann. § 58-3-140; *Hamm v. S.C. Public Serv. Comm'n*, 364 S.E. 2d 455, 456 (S.C. 1988) (in rate cases, "Public Service Commission is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates"); *Tennessee Cable Television Assoc. v. Tenn. Pub. Serv. Comm'n*, 844 S.W. 2d 151, 159 (Tenn. 1992) ("When the General Assembly empowered the Commission to fix rates, it also signaled its clear intent to vest in the Commission practically plenary authority over the utilities within its jurisdiction.").

[12] *See, e.g., Talton Telecomms. Corp. v. Coleman*, 665 So. 2d 914, 917 (Ala. 1995) (holding that Alabama Commission's exclusive jurisdiction goes beyond rate making and encompassed complaint about absence of filing of tariff); *DeKalb County, Ga. v. S. Bell Tel. & Tel. Co.*, 358 F. Supp. 498, 504 (N.D. Ga. 1972) (where plaintiff sought injunctive relief prohibiting the collection of the defendant's rates, "the plaintiff's remedy is first with the Georgia Public Service Commission and, after administrative remedies are exhausted, in the state courts."); Order, *Fulton Tel. Co., Inc. et al. v. BellSouth Telecommunications, Inc.*, Miss. Pub. Serv. Comm'n, Docket No. 99-AD-0919, Aug. 10, 2000 (attached as Exhibit "D") (Commission asserted exclusive original jurisdiction over breach of contract dispute between BellSouth and independent phone companies); *Arnold Line Water Ass'n, Inc. v. Miss. Pub. Serv. Comm'n*, 744 So. 2d 246 (Miss. 1999).

D. Global Crossing's Complaint Should Be Dismissed Because Its Claims Lie Within the Primary Jurisdiction of the State Commissions

To the extent that the Court finds that some or all of the State Commissions do not have exclusive jurisdiction over this matter, federal courts have routinely invoked the doctrine of primary jurisdiction in situations similar to this case. Primary jurisdiction is a judicially created doctrine, pursuant to which a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency. *Smith v. GTE Corp.*, 236 F.3d 1292, 1298 n.3 (11th Cir. 2001). It is a

> discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process by having agencies pass in the first instance on technical questions of fact uniquely within the agency's expertise and experience, or in cases whose referral is necessary to secure uniformity and consistency in the regulation of business, such as issues requiring the exercise of administrative discretion.

Columbia Gas Transmission Corp. v. Allied Chem. Corp., 652 F.2d 503, 520 n.14 (5th Cir. 1981) (citation omitted).[13]

Although there is "no fixed formula" for its application, the Supreme Court has explained that the doctrine of primary jurisdiction comes into play

[13] Decisions of the former Fifth Circuit filed before October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

> whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Western Pac. R.R. Co., 352 U.S. at 64.

In every case, the ultimate question is whether "the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* Those reasons include achieving uniformity and consistency in the regulation of business, and taking advantage of the expert and specialized knowledge of the agencies involved. *Id.*

These reasons are present here. As discussed below, the State Commissions have regulatory jurisdiction and specialized knowledge to interpret the various state tariffs at issue, each of which governs the determination and application of the applicable intrastate access charges.

1. The State Public Commissions Have Jurisdiction and Authority Over Interpretation of Intrastate Tariffs

Global Crossing cannot reasonably dispute that the State Commissions have jurisdiction over the issues raised in its Complaint. Each of the State Commissions has jurisdiction to regulate and supervise BellSouth with respect to its access charges and service, as well as the completion of intrastate calls from Global

Crossing and other IXCs.[14] Each of the State Commissions has also approved the state tariff at issue, and therefore has an ongoing responsibility to oversee the operation of the state tariff and resolve any disputes over its interpretation.[15] Global Crossing's Complaint involves two principal issues: interpretation of the alleged audit requirement in BellSouth's State Access Tariffs and interpretation of the requirements for PIU calculation and jurisdictional separation in those same tariffs. Both of these issues have a direct impact on the access charges under the state tariffs. For these reasons, the State Commissions have the jurisdiction and authority to resolve the issues raised in Global Crossing's Complaint.

As noted above, BellSouth has filed complaints against Global Crossing with each of the State Commissions based on Global Crossing's underpayment for intrastate access charges. The Tennessee Regulatory Authority has already set a schedule for discovery and a hearing. In an almost identical matter, the North Carolina Utilities Commission ("NCUC") ordered discovery, held hearings, and

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[14] *See* Ala. Code §§ 37-1-31 & 37-1-32; Fla. Stat. Ann. §§ 364.01, 364.27, & 366.04; O.C.G.A. §§ 46-2-20, 46-2-23, & 46-5-168; La. Rev. Statute, Title 45; 1166; La. Const. Art. IV, § 21(B); Miss. Code Ann. § 77-3-5; N.C. Gen. Stat. § 62-2; S.C. Code Ann. § 58-3-140; Tenn. Code Ann. § 65-4-104, 65-4-117. *See also Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1310 (D.C. Cir. 1988) ("State regulatory agencies have jurisdiction to set rates for local and intrastate telephone service.").

[15] *See, e.g., Talton Telecomm. Corp.*, 665 So.2d 914; *In re Complaint by BellSouth Telecomms., Inc. v. Thrifty Call, Inc.*, 2001 WL 1083687 (Fla. P.S.C., Aug. 28, 2001); *Daily Advertiser*, 612 So. 2d 7 (recognizing the commission's ongoing responsibility to oversee operation of clauses in filed tariffs).

ultimately found in BellSouth's favor against another IXC, Thrifty Call, Inc., ordering Thrifty Call to pay BellSouth for its underpayment of intrastate access charges from 1996 to 2000. *See Thrifty Call Order*, Exh. B. In addition, the Florida Public Service Commission has denied motions to dismiss and asserted jurisdiction over PIU disputes similar to this one.[16]

The FCC has also recognized the jurisdiction of state commissions over intrastate tariffs, to the exclusion of FCC jurisdiction. As discussed above, the FCC held that the Florida Public Service Commission had jurisdiction over a claim for the recovery of intrastate access charges. *LDDS,* 15 F.C.C. Record at 4950.

2. The Issues in Dispute Require the Special Expertise of the State Commissions

Where an agency is charged with responsibility for regulating a complex industry, it is much better equipped than the courts, "by specialization, by insight

[16] *See* Order Granting Motion for Leave to File Supplemental Authority and Denying Motion to Dismiss or, in the Alternative Motion to Stay, *In re Complaint by BellSouth Telecomms., Inc. against Thrifty Call, Inc. Regarding Practices in the Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Servs.*, Fla. Pub. Serv. Comm'n Docket No. 000475-TP, Order No. PSC-00-1568-PCO-TP, 2000 WL 1370442 (Aug. 31, 2000) (BellSouth's allegations that Thrifty Call had overstated its terminating PIU, thereby causing BellSouth financial injury, stated a claim upon which relief could be granted); Order Denying Motion to Dismiss or, in the Alternative, Motion to Stay, *In Re Complaint by BellSouth Telecomms., Inc. against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and Nat'l Tel. of Fla. Regarding the Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Servs.*, Fla. Pub. Serv. Comm'n Docket No. 000690-TP, Order No. PSC-00-2081-PCO-TP, 2000 WL 1741911 (Nov. 1, 2000) (refusing to dismiss case for failure to state claim or stay pending audit, and asserting jurisdiction over the matter).

gained through experience, and by flexible procedure," to gather the relevant facts that underlie a particular claim involving that industry. *Far East Conf. v. U.S.*, 342 U.S. 570, 575 (1952).

This case involves the technical aspects and particular language of BellSouth's State Access Tariffs in eight states. In situations where tariff interpretation is required, federal courts have routinely invoked the doctrine of primary jurisdiction and referred the matter to the appropriate state commission.[17] The resolution of the parties' dispute will require an analysis of eight state tariffs and the interpretation of each of those tariffs on issues including: what constitutes an intrastate call; what methodology is appropriate for the calculation of the PIU; whether audit provisions of the tariffs are mandatory or optional; and what the

[17] *See, e.g., MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1104 (3d Cir. 1995) ("issues that implicate a utility's tariff are deemed to be within the special expertise of the [state utility commission]"); *Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183, 187 (5th Cir. 1990) ("Routing the case through the PUC will permit the PUC to apply its specialized knowledge of rates and their application. That knowledge should prove helpful in resolving this particular claim."); *Indus. Communications Sys. v. Pac. Tel. & Tel. Co.*, 505 F.2d 152, 157 (9th Cir. 1974); *CSI/Communication Sys., Inc. v. S. Cent. Bell Tel. Co.*, 346 F.Supp. 487 (E.D. Tenn. 1971). *See also D.J. Hopkins, Inc. v. GTE Northwest*, 89 Wash. App. 1, 8-9, 947 P.2d 1220, 1224-25 (1997) (Washington state utility commission has special competence to resolve consumer claims alleging deceptive billing practices by telecommunications providers). *Cf. Western Pac. R.R. Co.*, 352 U.S. 59 (construction of tariff to determine whether shipment was subject to higher rates was within primary jurisdiction of Interstate Commerce Commission); *Allnet Communication Serv., Inc. v. Nat'l Exchange Carrier Ass'n*, 965 F.2d 1118, 1121 (D.C. Cir. 1992) ("Given the concern for uniformity and expert judgment, it is hardly surprising that courts have frequently invoked primary jurisdiction in cases involving tariff interpretations.").

timeframe is for recovery of backbilled intrastate access charges. These technical questions are more appropriately referred to the expertise of the State Commissions.

3. Interests of Uniformity and Consistency Weigh in Favor of Invoking the Primary Jurisdiction Doctrine

Each of the State Commissions has a special interest in ensuring that the appropriate methods for calculating PIU and the jurisdictional reporting requirements are consistent with its other decisions. Some Commissions have already issued decisions on these issues, and there are eight pending proceedings in the State Commissions between Global Crossing and BellSouth on the very issues set forth in Global Crossing's Complaint. Because of the clear need for uniformity within each state, dismissal of this case is appropriate. *See, e.g., MCI Telecomms., Corp.*, 71 F.3d at 1104 (deferring to state PUC to be sensitive to the need for uniformity and consistency in agency policy); *Penny*, 906 F.2d at 187 (finding that the PUC's specialized knowledge of rates and their application would "aid in creating more uniform standards to be followed when evaluating other claims for discrimination.").

4. Declaratory Judgment Actions Are Disfavored Where State Interests Are Concerned

Global Crossing is seeking declaratory judgments and injunctions from this Court that, if granted, would preempt or prejudge issues that are pending before state administrative bodies. The Supreme Court has rejected similar attempts as being incompatible with a proper federal-state relationship:

> We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the state affected. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

Pub. Serv. Comm'n of Utah v. Wycoff, 344 U.S. 237, 247 (1952) (citations omitted); *see also Allnet Communication Serv.*, 965 F.2d at 1121 ("Federal declaratory judgments are available as a matter of judicial discretion, not as of right, and are not to be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal."). Because the dispute at issue here is pending before the State Commissions, Global Crossing's declaratory judgment claims should not be allowed to preempt the primary jurisdiction of eight state public service commissions.

E. The Court Lacks Subject-Matter Jurisdiction Over Global Crossing's Claims Under the Johnson Act

The Johnson Act, 28 U.S.C. § 1342, prohibits a district court, with limited exceptions, from enjoining the operation or enforcement of a state agency's order affecting the rates of a public utility. Indeed, "Congress has seriously curtailed federal jurisdiction in the area of the state rate-making policy." *DeKalb County, Ga.*, 358 F. Supp. at 503 (finding no federal court jurisdiction under Johnson Act for claim that sought injunctive relief against collection of company's rates). "The evil sought to be remedied by the Johnson Act was the federal courts' interference with the states' own control of their public utility rates." *Tennyson v. Gas Service Co.*, 506 F.2d 1135, 1137 (10th Cir. 1974).

The Johnson Act provides prohibits district courts from "enjoin[ing], suspend[ing] or restrain[ing] the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency" where: (1) jurisdiction is based solely on diversity of citizenship or violation of the U.S. Constitution; (2) the order does not interfere with interstate commerce; (3) and was entered "after reasonable notice and hearing;" and, (4) a plain, speedy and efficient remedy may be had in the courts of such State. 28 U.S.C. § 1342.

Global Crossing's Complaint seeks relief that would violate the Johnson Act's mandated deference to state agencies. Global Crossing's claims depend on interpretations of BellSouth's State Access Tariffs, and for this reason, are, in fact, based "solely on diversity of citizenship," satisfying the first requirement of the Johnson Act. *See* 28 U.S.C. § 1342(1). Although Global Crossing alleges federal question jurisdiction, its claims can be resolved only by interpreting intrastate tariffs. For example, Global Crossing requests that this Court enjoin BellSouth from seeking payment for intrastate access fees that are governed by its intrastate tariff. *See* Compl. ¶ 35. Global Crossing's claims do not arise under federal law because federal law does not "create[] the cause of action," nor does Global Crossing's "right to relief necessarily depend[] on resolution of a substantial question of federal law." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

More fundamentally, it is quite obvious that Global Crossing is attempting to bypass the State Commissions' review of these issues, and consequently, "restrain the operation of, or compliance with" an order affecting rates.[18] In *Hanna Mining*

[18] *See Hanna Mining Co. v. Minn. Power & Light Co.*, 573 F. Supp. 1395, 1401 (D. Minn. 1983) ("Federal courts may not impinge upon a rate order by taking any action that would affect it, even indirectly."). *See also Nat'l Teleinformation Network, Inc. v. Mich. Pub. Serv. Comm'n*, 687 F. Supp. 330 (W.D. Mich. 1988) (court lacked subject-matter jurisdiction under Johnson Act over request for injunction compelling Michigan Commission to provide access to certain service under disputed tariff provision).

Company v. Minnesota Power & Light Company, the court held that the Johnson Act precluded the federal district court from asserting jurisdiction over a breach of contract action against a utility because the provision at issue affected rates. 573 F. Supp. at 1401. Similarly, Global Crossing asks the Court to interpret provisions of a state tariff that directly affect BellSouth's intrastate access charges. Thus, both the declaratory and injunctive relief requested by Global Crossing would impinge on the State Commissions' orders regarding BellSouth's intrastate access charges.

There can be no real dispute that the other conditions of the Johnson Act are met: the orders approving the contested intrastate tariffs and subsequent orders interpreting the audit and PIU provisions do not interfere with interstate commerce and were made after reasonable notice and hearing, 28 U.S.C. § 1342(3); and the state administrative agencies and state courts provide plain, speedy and efficient remedies, 28 U.S.C. § 1342(4). Because the Johnson Act applies to Global Crossing's claims, subject-matter jurisdiction is lacking, and this Court should therefore dismiss the complaint with prejudice.

F. This Court Should Defer to the Pending State Commission Proceedings Under the *Burford* Abstention Doctrine

The Supreme Court has held that when adequate state court review is available, a federal court sitting in equity should abstain from interfering with

proceedings of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) when the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350 (1989) (expressing formulation of *Burford* abstention announced in *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)).

In *Burford*, the Supreme Court affirmed a federal district court's decision to dismiss a complaint filed by Sun Oil Company regarding the validity of an order of the Texas Railroad Commission affecting certain oil well permits. The Court held that the federal court properly declined to exercise jurisdiction over the state regulatory issue, noting:

> The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

Burford v. Sun Oil Co., 319 U.S. 315, 333-34 (1943). In *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 349 (1951), the Court again held that federal courts should not interfere where "adequate state court review of an administrative order based upon predominantly local factors is available . . . ."

State legislatures have underscored the substantial public importance of state regulation of telecommunications services by granting exclusive jurisdiction to the State Commissions to regulate rates and services of telecommunications carriers. Congress has also recognized the importance of local regulation by granting state commissions sole jurisdiction over intrastate tariffs. *See* 47 U.S.C.§ 152(b); *LDDS*, 15 F.C.C. Record at 4955.[19] The assertion of jurisdiction over Global Crossing's claims would threaten the same kind of "comity-related" harm that the Supreme Court found in *Burford*: "regular use of the federal courts to conduct highly individualized review of particular, firm-specific regulatory decisions, would make it significantly more difficult for the state to administer its lawful regulatory system." *Bath Mem'l Hosp. v. Me. Health Care Fin. Comm'n*, 853 F.2d

[19] *See also Petitions of MCI Telecomms. & GTE Sprint Communications Corp. Regarding the Validity of Conn. Statute & Decisions of the Conn. Dept. of Public Util. Control Relating to Unauthorized Intrastate Traffic, Memorandum Opinion and Order*, 1 F.C.C. Record 270, 275 ¶ 24 (1986) ("This commission has long-recognized that, under the Communications Act, the states have broad latitude in their regulation of intrastate common carrier services. Thus, we have in some instances declined to preempt or otherwise intrude on state decisions or policies affecting intrastate services even if those state policies have had significant effects on matters over which this Commission has plenary authority.").

1007, 1014 (1st Cir. 1988). The First Circuit in *Bath Memorial* explained that *Burford* abstention recognizes the "institutional threat" of federal court interference with state regulatory schemes:

> [A]bstention in the *Burford* line of cases rested upon the threat to the proper administration of a *constitutional* state regulatory system. The threat was that the federal court might, in the context of the state regulatory scheme, create a parallel, additional, federal, "regulatory review" mechanism, the existence of which would significantly increase the difficulty of administering the state regulatory scheme. It was this special and unusual "institutional threat" that, in our view, led the federal courts to abstain.

Bath Mem'l, 853 F.2d at 1013. Global Crossing's attempt to have this Court preempt and prejudge issues that are properly before state administrative agencies poses a "special and unusual institutional threat."

IV. CONCLUSION

For the reasons set forth above, BellSouth respectfully requests that this Court dismiss Global Crossing's Complaint under the exclusive jurisdiction, primary jurisdiction, Johnson Act and/or *Burford* abstention doctrines. In the alternative, BellSouth requests that the Court stay this action pending resolution of the *BellSouth v. Global Crossing* matters currently before the State Commissions.[20]

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[20] *See supra* note 4.

Respectfully submitted this 30th day of November, 2001.[21]

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[21] Counsel for Defendant hereby certifies that this brief has been prepared in 14-point Times New Roman font as authorized by LR 5.1(B), NDGa.

EXHIBIT A

EXHIBIT A

BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.
Pending State Commission Proceedings

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., Ala. Pub. Serv. Comm'n, Docket No. 28292 (filed October 19, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., Fla. Pub. Serv. Comm'n, Docket No. 011378-TP (filed October 19, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., Ga. Pub. Serv. Comm'n, Docket No. 14587 (filed October 19, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., La. Pub. Serv. Comm'n, Docket No. U26010 (filed October 19, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., Miss. Pub. Serv. Comm'n, Docket No. 2001-AD-719 (filed October 19, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., N.C. Utils. Comm'n, Docket No. P-244, SUB 20 (filed October 22, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., S.C. Pub. Serv. Comm'n, Docket No. 2001-455-C (filed October 19, 2001)

In the Matter of BellSouth Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., Tenn. Regulatory Auth., Docket No. 01-00913 (filed October 19, 2001)

EXHIBIT B

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:

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FOR THRIFTY CALL, INC.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDING OF FACT

1. Thrifty Call 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

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

EXHIBIT C

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

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 1600, 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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EXHIBIT D

BEFORE THE

MISSISSIPPI PUBLIC SERVICE COMMISSION

Fulton Telephone Company, Inc., Mound Bayou Telephone Company, Inc., Delta Telephone Company, Inc., Franklin Telephone Company, Inc. Sledge Telephone Company, Inc., And Lakeside Telephone Company, Inc. Complainants/Counter-Defendants v. BellSouth Telecommunications, Inc. Defendant/Counter-Complainant	Docket No. 99-AD-0919

ORDER

Complainants/Counter-Defendants are six independent telephone companies (the Independents) authorized to provide telecommunications services within the geographic area described in their respective Certificates of Public Convenience and Necessity issued by this Commission. BellSouth Telecommunications, Inc. Defendant/Counter-Complainant (BellSouth) is a telephone company that also provides telecommunications services within its certificated area of service in Mississippi. All parties herein are subject to the exclusive original jurisdiction of this Commission. Mississippi Code Ann. §77-3-5. By Formal Complaint, the Independents assert certain claims related to tariffed services and to separate written agreements between BellSouth and each Independent. The Commission has jurisdiction over the subject matter of the Formal Complaint.

Originally, the Independents filed suit against BellSouth on their claims in the United States District Court for the Southern District of Mississippi under diversity of citizenship. That court stayed the case to permit this Commission to decide whether it would exercise jurisdiction over the dispute. The federal court made no finding as to the extent of the Commission's jurisdiction over this matter, referring the entirety of this dispute here so this Commission can render such a determination. The Independents initiated this docket through a Formal Complaint filed on December 2, 1999.

In a June 13, 2000 Order, the Commission requested briefs from the Parties on the following issues:

Issue 1: Under applicable law and the facts of the dispute giving rise to this matter, does the Commission have exclusive original jurisdiction over the entirety of this dispute between the Parties, including all of the claims asserted by Complainants in their Formal Complaint and by Counter-complainant in its Formal Counterclaim?

Issue 2: Under applicable law and the facts of the dispute giving rise to this matter, which of the remedies sought by the Parties are potentially available to them from the Commission, and, if some of them are determined to be unavailable, whether such a determination would affect the scope or nature of the Commission's jurisdiction to adjudicate the entirety of this dispute?

We have thoroughly reviewed the briefs submitted by the parties, the record to date, and the applicable law, and we conclude that this Commission has exclusive original jurisdiction over the disputed matters raised in this proceeding.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The Commission has exclusive original jurisdiction to hear and decide the matters complained of in the Formal Complaint filed by the Complainants and in the Counter-Claim filed by the Defendant.

2. The Commission directs all Parties in this proceeding to cooperatively establish a procedural schedule, including the submission of pre-hearing briefs, and

submit such to the Commission, with a copy to the Staff, within thirty days of the date of this Order.

Chairman Nielsen Cochran voted Aye; Vice Chairman-Michael Callahan voted Aye; Commissioner Bo Robinson voted Aye.

SO ORDERED this the 10th day of August, 2000.

MISSISSIPPI PUBLIC SERVICE COMMISSION

NIELSEN COCHRAN, CHAIRMAN

MICHAEL CALLAHAN, VICE CHAIRMAN

BO ROBINSON, COMMISSIONER

ATTEST: A TRUE COPY

BRIAN U. RAY
Executive Secretary

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT has been sent to counsel for Global Crossing Telecommunications, Inc. as follows:

VIA HAND DELIVERY
Richard L. Robbins, Esq.
Sutherland Asbill & Brennan LLP
999 Peachtree Street, N.E.
Atlanta, Georgia 30309

VIA FACSIMILE AND FIRST CLASS U.S. MAIL, POSTAGE PREPAID
Ira Kasdan, Esq.
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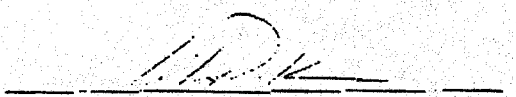
VIA FIRST CLASS U.S. MAIL, POSTAGE PREPAID
Michael J. Shortey, III, Esq.
Global Crossing North America, Inc.
180 South Clinton Avenue
Rochester, New York 14646

This 30th day of November, 2001.



Michael P. Kenny