

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Thrifty Call, Inc.)
Petition for Declaratory Ruling Concerning) CCB/CPD File No. 01-17
BellSouth Telecommunications, Inc.)
Tariff F.C.C. No. 1)

DECLARATORY RULING

Adopted: November 10, 2004

Released: November 12, 2004

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we address the petition for declaratory ruling filed by Thrifty Call, Inc. (Thrifty Call), seeking clarification of the meaning and application of certain provisions of BellSouth's interstate access tariff (federal tariff). We find that Thrifty Call incorrectly interpreted BellSouth's federal tariff provisions regarding the reporting of Thrifty Call's percentage of interstate usage (PIU). Furthermore, BellSouth's federal tariff does not require BellSouth to conduct an audit prior to correcting an IXC's misreported PIU. Finally, backbilling of intrastate access charges is governed by BellSouth's state tariffs and is properly addressed by the state commissions.

II. BACKGROUND

2. During the time period at issue, Thrifty Call provided long distance service in a number of states, including North Carolina and Florida. Thrifty Call acted as a reseller of long distance service. Thrifty Call entered into arrangements with other interexchange carriers (IXCs) to terminate calls originated by those IXCs' customers in North Carolina and Florida. The other IXCs handed off the calls

1 Thrifty Call Files Petition for Declaratory Ruling, Pleading Cycle Established, CCB-CPD File No. 01-17, Public Notice, 16 FCC Rcd 17617 (Com. Car. Bur. 2001). The following parties filed comments in response to the petition: BellSouth Corporation (BellSouth); SBC Communications, Inc. (SBC); Sprint Corporation (Sprint); and VarTec Telecom, Inc. (VarTec). The following parties filed replies: BellSouth; Thrifty Call; Competitive Telecommunications Association (CompTel); and VarTec. We note that, due to problems with the United States mail and a change in Commission procedures for processing material filed with the Office of the Secretary, CompTel's reply was filed on November 9, 2001, one day after the November 8 deadline. See Thrifty Call Petition for Declaratory Ruling Concerning BellSouth Communications, Inc. Tariff F.C.C. No. 1, CCB/CPD File No. 01-17, Order, 16 FCC Rcd 19315 (Comp. Pric. Div. 2001) (extending comment cycle due to problems with the United States mail and delays with processing material filed with the Office of the Secretary). We find that considering CompTel's reply comments in this proceeding provides interested parties and the Commission a more substantive and complete record on the issues.

2 Thrifty Call no longer conducts business in BellSouth territory. Prior to filing its petition, it ceased doing business as a long distance reseller and sold all its assets. Thrifty Call Petition at 2.

3 Thrifty Call Petition at 2.

4 Thrifty Call Petition at 2.

destined for North Carolina and Florida to Thrifty Call at its switch in Atlanta, Georgia.⁵ To terminate the calls in North Carolina and Florida, Thrifty Call obtained access to BellSouth's local exchange network by purchasing Feature Group D terminating access services from BellSouth's federal and state access tariffs.⁶ BellSouth asserts that, prior to 2000, it did not have the ability to collect call data that would have identified the jurisdiction of the traffic that it terminated for Thrifty Call.⁷ Therefore, the terminating access charges BellSouth assessed on Thrifty Call were based on percentage of interstate use (PIU) factors provided by Thrifty Call.⁸ Thrifty Call calculated its PIU based on its interpretation of the Commission's entry/exit surrogate (EES) methodology and reported the PIU to BellSouth on a quarterly basis.⁹ In January 2000, BellSouth notified Thrifty Call that it disputed Thrifty Call's reported PIU for the period from March 1999 to November 1999.¹⁰ After the parties were unable to agree upon a procedure to review and verify Thrifty Call's PIU reports, BellSouth filed complaints against Thrifty Call with the North Carolina Utilities Commission (North Carolina commission) and the Florida Public Service Commission (Florida commission), contending that Thrifty Call underreported intrastate minutes of use and, therefore, underpaid intrastate access charges.¹¹

3. The North Carolina commission ruled in favor of BellSouth and ordered Thrifty Call to pay BellSouth \$1,898,685 for unbilled intrastate access charges during the relevant period.¹² In ruling on

⁵ Thrifty Call Petition at 2.

⁶ Thrifty Call Petition at 2. Feature Group D services are trunk-side connections provided by incumbent local exchange carriers (LECs) to IXCs that allow end users to use 1+ dialing for long distance calls. Without the use of Feature Group D, the user must first dial a 7- or 10-digit number, a calling card number and PIN number, and then the desired telephone number. Harry Newton, *Newton's Telecom Dictionary*, 318 (19th ed. 2003).

⁷ BellSouth Opposition at 3.

⁸ BellSouth Opposition at 3.

⁹ Thrifty Call Petition at 2. Under the EES method of jurisdictional separation, calls that enter an IXC network in the same state as that in which the called party is located are deemed to be intrastate, and calls that terminate in a different state than their IXC point of entry are considered interstate. *Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, CC Docket No. 85-124, Memorandum Opinion and Order, 4 FCC Rcd 8448, 8450 n.5 (1989) (*1989 Jurisdictional Usage Order*).

¹⁰ Thrifty Call Petition, Exhibit 2 (Letter from J. Henry Walker, BellSouth Telecommunications, to Danny E. Adams, Counsel to Thrifty Call at 1 (Jan. 31, 2000) (BellSouth January 31, 2000 Letter)). BellSouth asserts that, prior to March 1999 Thrifty Call sent fewer than 500,000 minutes of terminating interstate and intrastate traffic to BellSouth. At that time Thrifty Call reported a PIU of 98 percent (percentage of traffic terminated for Thrifty Call as interstate traffic). In March 1999, however, BellSouth alleges that Thrifty Call's terminating interstate minutes increased dramatically to nearly four million minutes per month, while its terminating intrastate minutes remained unchanged. Despite this dramatic increase, Thrifty Call did not revise its PIU of 98 percent. BellSouth explains that Thrifty Call's failure to revise the reported PIU led BellSouth to examine more closely the nature of the traffic it terminated for Thrifty Call. In the course of this examination, BellSouth concluded that Thrifty Call was improperly reporting intrastate traffic as interstate traffic, thereby reporting an incorrectly high PIU. BellSouth Opposition at 4-6; BellSouth January 31, 2000 Letter at 1. Because interstate access charges generally are lower than intrastate access charges, a higher PIU reduces the amount of access charges paid by the customer.

¹¹ Thrifty Call Petition at 3.

¹² *BellSouth Telecommunications, Inc. v. Thrifty Call, Inc.*, Docket No. P-447, Sub 5, Recommended Order Ruling on Complaint (N.C. Util. Comm'n, April 11, 2001) (*North Carolina Commission Recommended Order*), Final Order Denying Exceptions and Affirming Recommended Order (N.C. Util. Comm'n, June 14, 2001); Order Denying Motion for Reconsideration or to Hold in Abeyance (N.C. Util. Comm'n, Aug. 27, 2001); *North Carolina ex rel.*

(continued....)

BellSouth's complaint against Thrifty Call on the issue of misreported PIU, the North Carolina commission determined that "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."¹³ The North Carolina commission also found that the audit provisions contained in BellSouth's North Carolina state tariff were permissive, not mandatory.¹⁴ The North Carolina Court of Appeals upheld the North Carolina commission's decision.¹⁵ The Florida commission has not acted on the complaint filed by BellSouth.

4. In the instant petition for declaratory ruling, Thrifty Call requests that the Commission resolve the following issues: (1) whether BellSouth's federal tariff requires the LEC to conduct an audit to resolve all PIU disputes; (2) whether the EES method should be used to calculate Thrifty Call's PIU in the event of an audit; and (3) in the event that an audit reveals discrepancies between the reported PIU and the audited PIU, whether BellSouth is limited by its tariff to one prior quarter of PIU revisions and associated backbilling.

III. DISCUSSION

A. Jurisdiction

5. As a threshold matter, we must determine our jurisdiction to address the issues raised in Thrifty Call's petition. In its opposition to Thrifty Call's petition, BellSouth asserts that this proceeding involves a dispute over intrastate access charges pursuant to BellSouth's state tariffs, and this Commission's jurisdiction does not extend to intrastate tariffs and intrastate percentage of use disputes.¹⁶ Similarly, SBC argues that in *LDDS Communications*, the Enforcement Bureau stated that it lacked jurisdiction to address a claim involving liability for intrastate access service, even if the claim arises out of a PIU dispute.¹⁷

6. Thrifty Call argues that the Commission has jurisdiction to address its petition, which raises issues related to the rights and liabilities between carriers within the context of the PIU verification process contained in BellSouth's federal tariff.¹⁸ Thrifty Call asserts that this issue was not specifically addressed in the *LDDS Communications* decision.¹⁹ VarTec acknowledges that it may be appropriate to apply a state tariff's method of allocating minutes of use and access revenue when the federal tariff is silent (as in the *LDDS Communications* case), but argues that a LEC must comply with any allocation

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Utilities Comm'n v. Thrifty Call, 571 S.E.2d 622 (N.C. Ct. App. 2002) (*North Carolina Appellate Decision*) (upholding decision of the North Carolina commission).

¹³ *North Carolina Commission Recommended Order* at 6.

¹⁴ *North Carolina Commission Recommended Order* at 6.

¹⁵ *North Carolina Appellate Decision*, 571 S.E. 2d at 627-28.

¹⁶ BellSouth Opposition at 9-10 (citing *LDDS Communication, Inc v. United Telephone of Florida*, File No. E-94-71, Memorandum Opinion and Order, 15 FCC Rcd 4950 (Enf. Bur. 2000) (*LDDS Communications*)).

¹⁷ SBC Opposition at 2.

¹⁸ Thrifty Call Reply at 15.

¹⁹ Thrifty Call Reply at 14. Thrifty Call argues that the *LDDS Communication* order failed to address the issue of PIU revision and instead focused on the state commission's right to regulate access rates after the PIU is set. Thrifty Call Reply at 15; *see also LDDS Communications*, 15 FCC Rcd at 4954-55, paras. 10-13.

method set forth in its federal tariff.²⁰ Thus, the Commission's orders and BellSouth's Tariff FCC No. 1 govern the allocation and billing of access charges between the federal and state jurisdictions, according to VarTec.²¹

7. The regulatory scheme set forth in the Communications Act of 1934, as amended (the Act), and the Commission's regulations requires identification of communications that use access service as either interstate or intrastate.²² Once assigned to the appropriate category, charges for the communications are separately regulated under the dual regulatory regime prescribed by the Act.²³ Thus, interstate and intrastate traffic are regulated under two separate but parallel regimes by different agencies – this Commission for interstate communications and the appropriate state commission for intrastate communications.

8. Subject to limited exceptions, LECs provide interstate switched access services pursuant to interstate tariffs filed with this Commission and provide their corresponding intrastate services through tariffs filed at the state level. Therefore, it is necessary to identify the jurisdictional nature of traffic to determine under which tariff the services are being provided.²⁴ It also is necessary to identify the jurisdiction of the traffic to ensure that the costs of the facilities used to carry this traffic are properly allocated between the interstate and intrastate jurisdictions. In the absence of a uniform measurement method for cost separations purposes, a LEC conceivably could recover its costs for the same investment and expenses in both the interstate and intrastate jurisdictions.²⁵ Such a result would violate the separations principle that the costs associated with a service allocated to both the federal and state jurisdictions equal 100 percent, but no more than 100 percent, of the total costs being allocated.²⁶

9. With many access services, such as those that provide automatic number identification (ANI) capability, jurisdiction is readily determined. For other access arrangements, however, such as Feature Group A and Feature Group B services, LECs typically lack the technical ability to identify and measure jurisdictional usage.²⁷ The Commission has concluded that, where both state and federal jurisdictions use a per-minute-of-use rate structure and rely on jurisdictional allocation of usage for

²⁰ VarTec Reply at 2.

²¹ VarTec Reply at 7-12.

²² See, e.g., *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930) (“The separation of the intrastate and interstate property, revenues, and expenses” of LECs “is essential to the appropriate recognition of the competent governmental authority in each field of regulation.”); 47 U.S.C. § 203(a); 47 C.F.R. §§ 69.2(b), 69.3(a) (in combination requiring filing of interstate access tariffs at the Commission).

²³ See, e.g., 47 U.S.C. §§ 151 (creating the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio”) and 152(b) (excluding from Commission jurisdiction matters relating to “intrastate communication service by wire or radio”).

²⁴ *Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, CC Docket No. 85-124, Recommended Decision and Order, 4 FCC Rcd 1966, para. 4 (Fed.-State Jt. Bd. 1989) (*Joint Board Order*).

²⁵ *Joint Board Order*, 4 FCC Rcd at 1973, para. 55.

²⁶ See, e.g., *Hawaiian Telephone Co. v. Public Utility Comm'n*, 827 F.2d 1264, 1274-76 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988) (*Hawaiian Telephone*); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566, 567 (7th Cir. 1984); *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142, 1146-47 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

²⁷ *1989 Jurisdictional Usage Order*, 4 FCC Rcd at 8448, para. 3.

billing, the interstate and intrastate minutes of use on these facilities must be identified in some compatible way to permit LECs to assess their customers the proper access charges.²⁸

10. Where jurisdictional usage is not readily ascertainable, a LEC must rely on an IXC to compile PIU reports based on the IXC's call detail records. Pursuant to the EES methodology, these call detail records identify every call that enters "an [IXC] network at a point within the same state as that in which the station designated by dialing is situated [as] an intrastate communication and every call for which the point of entry is in a state other than that where the called station is situated [as] an interstate communication."²⁹ These data are then reported in the IXC's PIU reports, which enable the LEC to charge the tariffed rates for interstate and intrastate access services. Because the combined PIU and the percentage of intrastate usage must equal 100 percent of the IXC's traffic, any change in the intrastate usage percentage automatically changes the PIU.³⁰

11. We conclude that it is within the Commission's jurisdiction to interpret BellSouth's federal interstate switched access tariff and to address the merits of this case within the parameters of federal law and Commission precedent.³¹ Exercise of this jurisdiction is not inconsistent with the Enforcement Bureau's decision in *LDDS Communications*. In that proceeding, an IXC filed a complaint with the Commission based on a LEC's adjustment to its PIU and related backbilling of intrastate access charges under the LEC's state tariff.³² The Enforcement Bureau found that the focus of the complaint was the IXC's liability for intrastate access charges, which was governed by the state tariff and was therefore under the state commission's jurisdiction.³³ As the Enforcement Bureau stated, had the issue arisen under the LEC's federal tariff, "this Commission unquestionably would have the authority to decide it."³⁴ Here, Thrifty Call is not seeking to adjudicate a complaint premised on an intrastate access charge billing dispute. Rather, Thrifty Call requests that the Commission issue a declaratory ruling on issues raised under BellSouth's federal tariff. Therefore, the Commission has jurisdiction to act on Thrifty Call's petition.

B. PIU Methodology

12. In its petition for declaratory ruling, Thrifty Call argues that BellSouth's federal tariff requires the use of the EES methodology in jurisdictionally separating Feature Group D services.³⁵ Thrifty Call further argues that, pursuant to the EES methodology, the jurisdictional nature of a call is determined by where the call enters Thrifty Call's network, not by the call's origination and destination

²⁸ *1989 Jurisdictional Usage Order*, 4 FCC Rcd at 8450, para. 14.

²⁹ *MCI Telecommunications Corp., Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, Memorandum Opinion and Order, 57 Rad. Reg. 2d (P&F) 1573, 1582, para. 25 (1985 *EES Order*), *recon. denied*, Memorandum Opinion and Order on Reconsideration, 59 Rad. Reg. 2d (P&F) 631 (1985) (1985 *EES Reconsideration Order*).

³⁰ For example, if an IXC initially reported a PIU of 50 percent and a 50 percent intrastate usage amount, a decrease in the intrastate usage to 40 percent would increase the PIU to 60 percent.

³¹ *See, e.g.*, 47 U.S.C. §§ 151, 201, 203.

³² *LDDS Communications*, 15 FCC Rcd at 4950, para. 1.

³³ *LDDS Communications*, 15 FCC Rcd at 4955, para. 13.

³⁴ *LDDS Communications*, 15 FCC Rcd at 4955, para. 13.

³⁵ Thrifty Call Petition at 15.

points.³⁶ In support of its arguments, Thrifty Call cites section 2.3.10(A)(1)(a) of BellSouth's federal tariff in effect at the time of the dispute, which states:

Pursuant to Federal Communications Commission Order FCC 85-145 adopted April 16, 1985 [the *1985 EES Order*], 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.³⁷

Thrifty Call contends that it routed nearly all of its wholesale traffic bound for BellSouth customers in North Carolina and Florida through its switch in Atlanta, Georgia.³⁸ Thrifty Call states that, in applying the EES methodology, it classified these calls as interstate because the calls entered its network at its switch in Georgia, a different state than the state in which the called party was situated.³⁹ Thrifty Call requests that the Commission clarify that the term "customer" as used in BellSouth's interstate tariff means the IXC customer purchasing the access services under the tariff, and that the point of entry into Thrifty Call's network is the only point of entry relevant to the development of the PIU.⁴⁰

13. Opponents of Thrifty Call's petition generally argue that Thrifty Call is engaging in an arbitrage scheme to take advantage of lower interstate access charges.⁴¹ Opponents assert that policy and precedent unequivocally require that traffic originating and terminating within the same state be deemed intrastate traffic.⁴² BellSouth, moreover, argues that the EES methodology applies only to determine the jurisdictional nature of Feature Group A and Feature Group B services, and is inapplicable to the Feature Group D services purchased by Thrifty Call from BellSouth.⁴³ Sprint further argues that the EES methodology was meant to apply only when call identifying information is not available and is not intended to allow multiple IXCs to convert intrastate traffic into interstate traffic.⁴⁴

³⁶ Thrifty Call Petition at 16-19.

³⁷ BellSouth Tariff FCC No. 1 § 2.3.10(A)(1)(a). Unless otherwise noted, all references to BellSouth's federal and state tariffs refer to the federal and state tariffs in effect at the time of the dispute, i.e., prior to 2000.

³⁸ Thrifty Call Petition at 15.

³⁹ Thrifty Call Petition at 15.

⁴⁰ Thrifty Call Petition at 19-20.

⁴¹ BellSouth Reply at 9-10; SBC Opposition at 6; Sprint Comments at 1.

⁴² BellSouth Opposition at 21-22 (citing *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (*Bell Atlantic*) and *Long Distance/USA, Inc. v. Bell Telephone Company of Pennsylvania*, File Nos. E-89-03 *et seq.*, Memorandum Opinion and Order, 10 FCC Rcd 1234, 1237-38, para. 13 (1995)); SBC Opposition at 5 (citing *Bell Atlantic*, 206 F.3d at 4); Sprint Comments at 4 (citing *Teleconnect v. Bell Telephone Company of Pennsylvania et al.*, File Nos. E-88-83 through E-88-103, Memorandum Opinion and Order, 6 FCC Rcd 5202 (Com. Car. Bur. 1991), *review and recon. denied*, 10 FCC Rcd 1626 (1995) (*Teleconnect Reconsideration Denial Order*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997) (noting that the Commission has consistently refused to consider intermediate switching points when determining the jurisdiction of a call)).

⁴³ BellSouth Opposition at 17-18.

⁴⁴ Sprint Comments at 5-7.

14. As a threshold matter, we are not persuaded by BellSouth's suggestion that the Commission never intended that the EES methodology apply to Feature Group D calls.⁴⁵ BellSouth does not cite to any Commission precedent precluding the use of the EES methodology for Feature Group D services in instances where call identifying information is not available. Although the majority of Feature Group D traffic provides some means of identifying the jurisdictional nature of the traffic, the Commission has not explicitly prohibited the use of the EES methodology to determine jurisdiction in the few cases where the incumbent LEC does not have the technical ability to receive jurisdictional information that is transmitted with Feature Group D traffic.⁴⁶

15. Although we agree with Thrifty Call that the EES methodology was the correct methodology to use in determining the jurisdiction of its traffic under BellSouth's federal tariff, we disagree with Thrifty Call's application of the method. Thrifty Call construed the terms "customer network" and "point of entry" in section 2.3.10(A)(1)(a) of BellSouth's federal tariff as applying to Thrifty Call's network.⁴⁷ Under Thrifty Call's interpretation, each call would be broken into two separate calls: one from the originating customer in North Carolina or Florida to Thrifty Call's switch in Georgia, and then a second call from Thrifty Call's Georgia switch to the called party in North Carolina or Florida. Thrifty Call's interpretation of these terms is incorrect and inconsistent with both Commission and court precedent holding that the points where the call originates and terminates are more significant than the intermediate facilities used to complete such communications.⁴⁸ Thus, a call is intrastate if it originates and terminates in the same state.⁴⁹ Courts have also found that interstate communication extends from the inception of a call to its completion, regardless of any intermediate points of switching or exchanges between carriers.⁵⁰ The fact that the calls at issue were routed through a switch in Georgia is immaterial

⁴⁵ BellSouth Opposition at 18.

⁴⁶ In this particular case, at the time of the dispute BellSouth did not have the capability to receive the ANI and calling party number (CPN) information that was transmitted with the Feature Group D traffic. BellSouth Opposition at 3. In 2000, BellSouth acquired the ability to calculate PIU factors for carriers through identification of a number of call fields that indicate the originating location of the call. BellSouth Opposition at 3 n.4.

⁴⁷ Thrifty Call Petition at 16.

⁴⁸ See, e.g., *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); *New York Telephone Co. Exchange System Access Line Terminal Charge for FX and CCSA Service, N.Y. P.S.C. Tariff No. 800 – Telephone*, Memorandum Opinion and Order, 76 FCC 2d 349, 352, para. 9 (1980); *Teleconnect Reconsideration Denial Order*, 10 FCC Rcd at 1629, para. 12. In support of its argument that the point where the call first enters its network is the origination point, Thrifty Call cites a description of the EES methodology in a 1991 Commission decision. Thrifty Call Petition at 18 (citing *Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket Nos. 89-79 and 87-313, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4535-36, para. 66 (1991) ("Under the EES, access customers designate the jurisdictional status of a call based on the relationship between the point where a call first enters their network (e.g., their POP) and the terminating number")). In that 1991 decision, however, the Commission was not addressing the situation where interexchange services are provided jointly by multiple IXCs for the same call.

⁴⁹ *Bell Atlantic*, 206 F.3d at 5. Although the Commission has applied this type of end-to-end analysis to traditional telecommunications services, such as those provided by Thrifty Call, it has acknowledged that an approach based on the geographic end points of a call may be a poor fit as applied to services that involve the Internet. See, e.g., *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316-17, 3320-21, paras. 16, 21 (2004) (noting that the idea of end points has little relevance for the use of a server via the Internet).

⁵⁰ *Bell Atlantic*, 206 F.3d at 4 (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC

to the jurisdiction of a call. Thrifty Call should have reported all calls where both the calling party and the called party were located in the same state as intrastate calls and should have reported all calls where the calling party was located in one state and the called party was located in another state as interstate calls.⁵¹

16. This construction of the relevant BellSouth tariff terms is consistent with the Commission's EES methodology. Under the EES methodology, calls that enter an IXC network in the same state as that in which the called station is located are deemed to be intrastate and calls that terminate in a different state than their IXC point of entry are considered interstate.⁵² In adopting the EES methodology, the Commission was attempting to devise a way for carriers more accurately to report their interstate and intrastate usage.⁵³ The Commission also was concerned about false allocations of traffic.⁵⁴ Thrifty Call entered into a contractual relationship with other IXCs whereby calls that entered the third-party IXC network in North Carolina were passed through a switch owned by Thrifty Call in Georgia and then terminated in North Carolina by Thrifty Call.⁵⁵ Thrifty Call then treated each call as two separate interstate calls – one call terminating in Georgia and the other call originating in Georgia – because the calls entered Thrifty Call's network at its switch in Georgia.⁵⁶ Instead, using the EES methodology, this type of call constitutes one intrastate call rather than two interstate calls. Thrifty Call incorrectly used as the point of entry the state in which the call entered *Thrifty Call's* network, rather than, as intended under the EES methodology, the state in which the call left the originating LEC's network and entered the IXC network. Thrifty Call's application of the EES methodology is flatly inconsistent with the Commission's purposes in adopting it.

C. Audits

17. BellSouth's federal tariff provides that "when a billing dispute arises ... [BellSouth] may, by written request, require the [IXC] to provide the data the [IXC] used to determine the projected interstate percentage."⁵⁷ BellSouth's federal tariff further provides that "[t]his written request will be considered the initiation of the audit."⁵⁸ On January 31, 2000, BellSouth notified Thrifty Call that it disputed the PIU reported by Thrifty Call and that it would invoke the jurisdictional verification

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Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3695-96, para. 10 (1999)).

⁵¹ It is noteworthy that Thrifty Call did not apply a consistent methodology to determine the jurisdiction of its calls. Thrifty Call admitted that in Georgia it used the originating and terminating points of the calls to determine their jurisdiction, rather than treating 100 percent of the calls as intrastate due to the use of Thrifty Call's Georgia-based switch in routing the calls. *North Carolina Commission Recommended Order* at 6.

⁵² *1985 EES Order*, 57 Rad. Reg. 2d (P&F) at 1581-83, paras. 25-32.

⁵³ *1985 EES Order*, 57 Rad. Reg. 2d (P&F) at 1580-82, paras. 20-25.

⁵⁴ *1985 EES Order*, 57 Rad. Reg. 2d (P&F) at 1583, paras. 29-30.

⁵⁵ Thrifty Call Petition at 2.

⁵⁶ Thrifty Call Petition at 15.

⁵⁷ BellSouth FCC Tariff No. 1 § 2.3.10(B)(1). *See also* BellSouth North Carolina Access Services Tariff § E2.3.14(B)(1) (containing identical language).

⁵⁸ BellSouth FCC Tariff No. 1 § 2.3.10(B)(1). *See also* BellSouth North Carolina Access Services Tariff § E2.3.14(B)(1) (containing identical language).

procedures of its applicable state access tariffs.⁵⁹ At that time, BellSouth also requested an immediate payment of \$1,801,331 for misreported traffic between March 1999 and November 1999.⁶⁰

18. BellSouth and Thrifty Call could not reach an agreement regarding the terms of the audit.⁶¹ In particular, BellSouth and Thrifty Call could not agree as to who would conduct the audit.⁶² The audit terms of BellSouth's federal and state tariffs provide that audits may be conducted by: (a) an independent auditor under contract to the telephone company; (b) a mutually agreed upon independent auditor; or (c) an independent auditor selected and paid for by the customer.⁶³ BellSouth's tariffs do not, however, provide a method for choosing an auditor if the parties cannot agree. In addition, BellSouth and Thrifty Call disagreed as to whether Thrifty Call should make the payment of \$1,801,331 requested by BellSouth in advance of the audit to cover the alleged misreporting of the traffic.⁶⁴ BellSouth and Thrifty Call also disagreed as to whether the audit results should be applied to one prior quarter of PIU reports, or for the entire time period covered by the audit.⁶⁵ While BellSouth and Thrifty Call were discussing the scope and terms of the audit, BellSouth initiated test calls over the Thrifty Call network to determine how calls that BellSouth knew to be intrastate affected Thrifty Call's PIU.⁶⁶ As a result of its test calls and the inability of the parties to agree on the terms and scope of the audit, BellSouth withdrew its audit request and filed complaints with the North Carolina commission and the Florida commission contending that Thrifty Call misreported its PIU.⁶⁷

19. In the instant petition for declaratory ruling, Thrifty Call asks the Commission to interpret the audit provisions in BellSouth's federal tariff to preclude BellSouth from attempting to collect underpaid access charges until an audit is completed.⁶⁸ First, Thrifty Call and VarTec argue that the audit provision is mandatory and that the term "may" should be read as "shall" in this context because that is

⁵⁹ Thrifty Call Petition at 3 and Exhibit 2; BellSouth Opposition at 5.

⁶⁰ Thrifty Call Petition at 3; BellSouth Opposition at 5; BellSouth January 31, 2000 Letter at 1.

⁶¹ Thrifty Call Petition, Exhibit 2 (Letter from J. Henry Walker, BellSouth Telecommunications, to Danny E. Adams, Counsel to Thrifty Call at 1) (Apr. 7, 2000) (BellSouth April 7, 2000 Letter)).

⁶² Thrifty Call Petition, Exhibit 2 (Letter from Danny E. Adams, Counsel to Thrifty Call, to J. Henry Walker, BellSouth Telecommunications at 2 (Feb. 10, 2000) (Thrifty Call February 10, 2000 Letter) (requesting that the accounting firm Ernst & Young conduct the audit); Letter from Danny E. Adams, Counsel to Thrifty Call, to J. Henry Walker, BellSouth Telecommunications at 2 (Mar. 22, 2000) (Thrifty Call March 22, 2000 Letter) (noting the delay of the audit pending agreement by BellSouth to waive a conflict of interest regarding Ernst & Young's prior work)).

⁶³ See BellSouth FCC Tariff No. 1 § 2.3.10 (B)(3); BellSouth North Carolina Access Services Tariff § E2.3.14(B)(3). The audit provisions contained in the federal and North Carolina state tariffs are virtually identical. The only apparent differences are that the federal tariff uses the term "customer" to refer to end users and IXC's and the state tariff uses the term IC to refer to IXC's, and the federal tariff uses the term "Telephone Company" to refer to BellSouth and the state tariff uses the term "Company" to refer to BellSouth. See BellSouth FCC Tariff No. 1 § 2.3.10 (B), (D) and (E) and BellSouth North Carolina Access Services Tariff § E2.3.14(B), (D) and (E).

⁶⁴ BellSouth January 31, 2000 Letter at 1; Thrifty Call February 10, 2000 Letter at 2.

⁶⁵ BellSouth April 7, 2000 Letter at 1-2.

⁶⁶ BellSouth Opposition at 5.

⁶⁷ BellSouth Opposition at 6; Thrifty Call Petition at 3.

⁶⁸ Thrifty Call Petition at 7-13.

BellSouth's consistent practice within the tariff.⁶⁹ In support of its position, Thrifty Call notes that section 2.3.10(B)(2) of BellSouth's federal tariff provides that "verification audits may be conducted no more frequently than once per year."⁷⁰ Thrifty Call asserts that the word "may" in this section must be construed as "shall" because a previous Common Carrier Bureau decision concluded that audits could not be conducted more frequently than once a year.⁷¹ In response, BellSouth notes that both the courts and the Commission have consistently interpreted "may" as permissive, optional, or discretionary.⁷²

20. Our review of BellSouth's federal tariff does not support Thrifty Call's assertion that BellSouth must complete an audit before it can attempt to collect underpaid access charges.⁷³ The actual language of section 2.3.10(B)(2) states that "verification audits may be conducted"; it does not require BellSouth to conduct a verification audit.⁷⁴ Thus, BellSouth may choose not to conduct yearly verification audits. Moreover, a review of this section of BellSouth's tariff also reveals that BellSouth has used "shall" where it intends to create a mandatory obligation.⁷⁵ For example, BellSouth FCC Tariff No. 1 § 2.3.10(B)(1) provides that "[t]he customer *shall* supply the [requested PIU] data to an independent auditor or the Telephone Company within 30 days of the Telephone Company request."⁷⁶ BellSouth has used "shall" in this section where it intends to create a mandatory obligation; we therefore construe "may" in the same section as permissive, not mandatory.⁷⁷

21. Thrifty Call also asserts that a reading of the entire tariff compels the conclusion that the

⁶⁹ Thrifty Call Petition at 9-10; VarTec Reply at 13-15. Thrifty Call also notes that, in section 69.3 of its rules, the Commission used "may" when it meant to impose a mandatory obligation. Thrifty Call Petition at 12-13 (citing 47 C.F.R. § 69.3(e)(7) and *Southwestern Bell Telephone Co. FCC Tariff No. 73*, CC Docket No. 97-158, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19321, paras. 17-18 (1997) (rejecting SWBT's argument that section 69.3(e)(7)'s statement that a carrier "may file a tariff that is not an association tariff" creates a permissive, not a mandatory, obligation for a LEC to file a tariff)).

⁷⁰ Thrifty Call Petition at 11 (citing BellSouth FCC Tariff No. 1 § 2.3.10(B)(2)).

⁷¹ Thrifty Call Petition at 11 (citing *BellSouth Tel. Cos., Revisions to Tariff FCC No. 4*, Order, 5 FCC Rcd 716 (Com. Car. Bur. 1990)).

⁷² BellSouth Opposition at 13 (citing *Shea v. Shea*, 597 P.2d 418 (Okla. 1975) ("may" usually is employed to imply permissive or discretionary conduct); *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket 96-238, Notice of Proposed Rulemaking, 11 FCC Rcd 20823, 20855 (1996) (a defendant may, but is not required to, file permissive counterclaims)).

⁷³ The parties agree that in this case BellSouth did initiate the audit process, but it did not complete the audit because the parties disagreed over how the audit would be conducted. Thrifty Call Petition at 3, 13; BellSouth Opposition at 5-6.

⁷⁴ BellSouth FCC Tariff No. 1 § 2.3.10(B)(2). See also Thrifty Call Petition at 11 (acknowledging that BellSouth may initiate an audit less frequently than once per year (or never at all)).

⁷⁵ BellSouth FCC Tariff No. 1 § 2.3.10(B)(1) ("The customer shall keep records of call detail" and "The customer shall supply the data to an independent auditor").

⁷⁶ BellSouth FCC Tariff No. 1 § 2.3.10(B)(1) (emphasis added).

⁷⁷ See *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973) (finding that a permissive interpretation is proven because, when Congress intended a mandatory directive it used "shall" in the same statute). See also *Merchants Bank v. Federal Reserve Bank*, 262 U.S. 649, 662 (1923) (finding that, ordinarily, "may" is a permissive and not a mandatory term).

audit mechanism in the tariff is the sole method by which BellSouth may dispute a customer's reported PIU.⁷⁸ Thrifty Call argues that the six-month record retention provision in BellSouth's federal tariff is tied to the audit procedures, and, because the record retention provision is mandatory, the audit provisions must also be construed as mandatory.⁷⁹ Thrifty Call is correct that the six-month record retention requirement is mandatory under BellSouth's federal tariff, but it is a mandatory obligation on the customer, not on BellSouth.⁸⁰ We do not see how the imposition of a record-keeping obligation on an IXC taking service under the tariff could in any way be construed to limit the remedies available to BellSouth if it determines – through those records or through other information – that an IXC is not complying with the tariff.

22. For similar reasons we reject CompTel's argument that the filed tariff doctrine compels BellSouth to abide by the jurisdictional report verification procedures, including the audit provisions, contained in its tariffs before it may seek to recover underpaid access charges.⁸¹ Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the "exclusive source" of the terms and conditions governing the provision of service of a common carrier to its customers.⁸² Although BellSouth's federal tariff explicitly states that BellSouth "may" conduct audits,⁸³ we find that this language creates a permissive remedy and does not preclude BellSouth from pursuing other legal remedies and dispute resolution options, including a collection action based on information not obtained through an audit.⁸⁴

23. Finally, Thrifty Call asserts that, in creating the PIU process, the Commission adopted the recommendation of the Federal-State Joint Board on Separations (Joint Board) and instructed LECs to include PIU audits as a part of the dispute resolution mechanism in their access tariffs.⁸⁵ VarTec argues that, regardless of the language of the tariff, the Commission intended the audit portion of the dispute resolution procedure to be mandatory.⁸⁶ We disagree. The Joint Board recommended, and the Commission approved, "general verification guidelines, including the audit process, in lieu of uniform, nationwide procedures."⁸⁷ In making its recommendation, the Joint Board specifically found that its experience in implementing the *1985 EES Order* and the record in the proceeding did not indicate that uniform, nationwide verification procedures were necessary.⁸⁸ Therefore, contrary to Thrifty Call and

⁷⁸ Thrifty Call Petition at 11.

⁷⁹ Thrifty Call Petition at 11-12 (citing BellSouth FCC Tariff No. 1 § 2.3.10 (C)).

⁸⁰ Section 2.3.10(C)(1) of BellSouth's federal tariff states that "[t]he customer shall retain for a minimum of six (6) months call detail records . . ." BellSouth FCC Tariff No. 1 § 2.3.10(C)(1).

⁸¹ CompTel Reply at 5.

⁸² *American Tel. & Telegraph Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222-27 (1998).

⁸³ BellSouth FCC Tariff No. 1 § 2.3.10(B)(1).

⁸⁴ See *Advantel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 511 (E.D. Va. 2000) (finding that a tariff is an offer to contract, therefore a carrier may bring an action to enforce a tariff to collect amounts due under it before the courts).

⁸⁵ Thrifty Call Petition at 4-6. See also VarTec Comments at 5 (audit process is the only PIU dispute resolution procedure provided for by the Commission).

⁸⁶ VarTec Comments at 7.

⁸⁷ *1989 Jurisdictional Usage Order*, 4 FCC Rcd at 8450, para. 15; *Joint Board Order*, 4 FCC Rcd at 1966, para. 2.

⁸⁸ *Joint Board Order*, 4 FCC Rcd at 1975, para. 74.

VarTec's claims, the Commission did not require LECs to initiate audits before attempting to resolve PIU disputes. We find that the audit provisions contained in BellSouth's federal tariff are permissive.⁸⁹ Accordingly, given the permissive language of BellSouth's tariff regarding audits and the fact that the parties could not reach agreement on the terms, conditions, and scope of the audit, it was not unreasonable for BellSouth to seek an alternative resolution of the issues.

D. Backbilling

24. Section 2.3.10(D)(1) of BellSouth's federal tariff states:

The Telephone Company will adjust the customer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit is completed, the usage for the quarter prior to the completion of the audit, and the usage for the two (2) quarters following the completion of the audit.⁹⁰

In a separate subsection, section 2.3.10(C)(1) of BellSouth's federal tariff mandates that "[t]he customer shall retain for a minimum of six (6) months call detail records that substantiate the interstate percent provided to the Telephone Company . . ."⁹¹ Thrifty Call argues that, under section 2.3.10(D)(1) of its federal tariff, BellSouth is limited to one prior quarter of PIU revisions and backbilling.⁹² Thrifty Call further argues that, because section 2.3.10(C)(1) of BellSouth's tariff requires IXCs to retain call detail records for only six months, it would be next to impossible for carriers to controvert BellSouth's recalculations of earlier periods.⁹³ Similarly, VarTec asserts that the six-month record retention period provision in BellSouth's tariff is meaningless if BellSouth is free to seek retroactive adjustment of the PIU for services provided prior to that six-month period, because the IXC would then need the call detail records from those past periods to defend itself.⁹⁴ VarTec notes that the Commission generally sets the duration of record retention periods so that records will be available during the period in which a dispute may arise.⁹⁵ Finally, Thrifty Call contends that section 415(a) of the Communications Act limits BellSouth to backbilling for a period no longer than two years.⁹⁶

25. In response, BellSouth asserts that, in situations where it chooses not to conduct an audit, or the PIU is not revised based on audit results, BellSouth is not limited to seeking retroactive payment for

⁸⁹ Our conclusion is consistent with the North Carolina commission's and court's findings that the audit provisions in BellSouth's North Carolina state tariff are permissive. *North Carolina Commission Recommended Order* at 6; *North Carolina Appellate Decision*, 571 S.E.2d at 626-27.

⁹⁰ BellSouth FCC Tariff No.1 § 2.3.10(D)(1).

⁹¹ BellSouth FCC Tariff No.1 § 2.3.10(C)(1).

⁹² Thrifty Call Petition at 14. *See also* CompTel Reply at 5-6 (arguing that the filed tariff doctrine compels BellSouth to abide by the limitations on backbilling contained in BellSouth's federal tariff).

⁹³ Thrifty Call Reply at 6-7.

⁹⁴ VarTec Comments at 8.

⁹⁵ VarTec Comments at 9 (citing *Policy and Rules Concerning the Interstate Interexchange Market*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996)).

⁹⁶ Thrifty Call Reply at 7 (citing 47 U.S.C. § 415). Section 415(a) requires that "[a]ll actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after." 47 U.S.C. § 415(a).

only one prior quarter.⁹⁷ BellSouth argues that in a case such as this one, which includes allegations of fraudulent and intentional misrepresentation of PIU, it would be unreasonable and unfair to limit the relief sought.⁹⁸ SBC argues that there is no basis to conclude that a tariff backbilling limitation operates as a *de facto* statute of limitations on damages.⁹⁹ Finally, BellSouth asserts that it would be discriminatory to BellSouth's other IXC customers to limit BellSouth to one prior quarter of payment for undercharges in this case.¹⁰⁰ BellSouth explains that, because it is legally obligated to bill and collect charges contained in its tariffs, it was required to collect full payment from Thrifty Call for the underreported PIU, just as it collected full payment from its other IXC customers.¹⁰¹

26. In ruling on BellSouth's state complaint against Thrifty Call, the North Carolina commission found that BellSouth provided sufficient evidence to support its claim for \$1,898,685 in backbilled intrastate access charges.¹⁰² The North Carolina commission rejected Thrifty Call's argument that BellSouth's recovery was limited by its tariff, finding this to be simply a variation of Thrifty Call's argument regarding the mandatory nature of the audit provisions in BellSouth's intrastate tariff, which it also rejected.¹⁰³ The North Carolina Court of Appeals agreed and found that the backbilling provisions of BellSouth's tariff apply only when an audit has been undertaken by BellSouth.¹⁰⁴ The court further found that the language of the tariff did not preclude the North Carolina commission from awarding BellSouth backbilled intrastate access charge payments because a bar on backbilling would deny BellSouth relief from the misreporting of access traffic.¹⁰⁵

27. In this case, the backbilling amount sought by BellSouth from Thrifty Call is based on an underpayment of intrastate access charges due to Thrifty Call's erroneous PIU calculation. Therefore, it was within the North Carolina commission's jurisdiction to determine whether BellSouth provided sufficient evidence to prove its claimed backbilling amount. The North Carolina commission found that

⁹⁷ BellSouth Opposition at 15-16. *See also* SBC Opposition at 4 (backbilling provisions do not provide the exclusive remedy for PIU misreporting).

⁹⁸ BellSouth Opposition at 15-16. *See also* SBC Opposition at 3-4 (asserting that there are fundamental differences between a tariff backbilling provision that is designed to protect customers that are assessed retroactive charges and a claim for damages arising out of unlawful and fraudulent behavior).

⁹⁹ SBC Opposition at 4.

¹⁰⁰ BellSouth Reply at 7.

¹⁰¹ BellSouth Reply at 7-8 (citing section 202 of the Act, prohibiting carriers from engaging in preferential treatment or unreasonable discrimination, and section 203 of the Act, mandating that carriers collect lawful, tariffed charges). 47 U.S.C. §§ 202 and 203.

¹⁰² *North Carolina Commission Recommended Order* at 7. Although the North Carolina commission's order states that this amount is for backbilled intrastate access charges for the period from 1996 to 2000, *North Carolina Commission Recommended Order* at 3, the North Carolina court decision states that the awarded amount of \$1,898,685 represents the difference between the application of the interstate access charge rate and the intrastate access charge rate for the period between January 1998 and April 2000. *North Carolina Appellate Decision*, 571 S.E.2d at 630.

¹⁰³ *North Carolina Commission Recommended Order* at 7. BellSouth's North Carolina state tariff contains language that is virtually identical to the back-billing audit provisions in section 2.3.10(D)(1) of BellSouth's federal tariff. BellSouth North Carolina Access Services Tariff §E2.3.14(D)(1); BellSouth FCC Tariff No. 1 § 2.3.10(D)(1).

¹⁰⁴ *North Carolina Appellate Decision*, 571 S.E.2d at 630.

¹⁰⁵ *North Carolina Appellate Decision*, 571 S.E.2d at 630.

BellSouth met this burden and the state court affirmed the decision. Accordingly, we deny Thrifty Call's petition with respect to this issue.¹⁰⁶

IV. ORDERING CLAUSES

28. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, and the authority delegated in section 0.91 of the Commission's rules, 47 C.F.R. § 0.91, that the Petition for Declaratory Ruling filed by Thrifty Call, Inc., is denied to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey J. Carlisle
Chief
Wireline Competition Bureau

¹⁰⁶ Thrifty Call argues that section 415(a) of the Act limits the damages sought by BellSouth to a period of, at most, two years. Thrifty Call Reply at 7 (citing 47 U.S.C. § 415). This section applies only to interstate access charges. If there are limits on the damages for intrastate access charges, such as those assessed by the North Carolina commission against Thrifty Call, they would be contained in state statutes.