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February 11, 2008

VIA FEDERAL EXPRESS

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Brandenburg Telephone Company, Complainant v. BellSouth Telecommunications, Inc., Defendant
PSC 2006-00447

Dear Ms. O'Donnell:

Enclosed for filing are the original and ten (10) copies of BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's Response to Brandenburg's Motion for Rehearing.

Sincerely,

Mary K. Keyer
General Counsel/Kentucky

cc: Parties of Record

704016

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BRANDENBURG TELCOM LLC **Complainant**	)	
v.	)	**Case No. 2006-00447**
BELLSOUTH TELECOMMUNICATIONS, INC. **Defendant**	)	

AT&T KENTUCKY'S RESPONSE TO BRANDENBURG'S MOTION FOR REHEARING

BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky"), by counsel, files its Response to the Motion for Rehearing filed by Brandenburg Telecom LLC ("Brandenburg"), and states the following:

I. INTRODUCTION AND PROCEDURAL HISTORY

Brandenburg's Motion for Rehearing should be denied because it contains nothing more than a restatement of legal arguments that Brandenburg has made repeatedly, and that the Kentucky Public Service Commission ("Commission") has properly rejected. When Brandenburg filed its complaint in 2006, it first argued that it was entitled to charge AT&T Kentucky (then BellSouth) for terminating switched access at the rates that appeared in its tariff, despite language in the interconnection agreement between the parties that clearly stated Brandenburg was entitled to charge the rates in AT&T Kentucky's tariffs for terminating switched access. Brandenburg's attempt to avoid the clear language of the interconnection agreement was premised

upon the theory that the interconnection agreement is somehow geographically limited so that it does not apply to the termination of traffic to Brandenburg's end users.

After AT&T Kentucky moved to dismiss the Complaint, Brandenburg responded to this motion with the second reiteration of the same argument. Subsequently, Brandenburg moved for summary judgment and made essentially the same argument for a third time. Brandenburg made the same argument for a fourth time in its Reply to AT&T Kentucky's Response to its motion to dismiss. Thus, prior to the Commission's entry of the *Order*, dated January 7, 2008, in which the Commission dismissed Brandenburg's claim with prejudice, Brandenburg had already made essentially the same argument four times. Brandenburg's response to the Commission's rejection of its often repeated argument was to file the Motion for Rehearing to make the same argument for a fifth time.

Brandenburg refers to the standard for summary judgment set forth in *Hendersonville v. Thomas*, 129 SW 3d, 858, 855 (Ky. App. 2004) and claims that "because there remain genuine issues of material fact, it is not a foregone conclusion that Brandenburg Telecom will be unable to prove any set of facts that would entitle it to relief." (Motion, p. 3). However, in its Motion, Brandenburg fails to raise any unresolved issues of material fact. Neither does Brandenburg identify any new facts that it could submit into the record if this case were to proceed. Instead, Brandenburg simply advances, once again, a flawed legal theory that is based on an implausible interpretation of the interconnection agreement. The Commission properly rejected this theory in the *Order* granting AT&T Kentucky's Motion to Dismiss, and it should do so again in response to Brandenburg's Motion for Rehearing.

II. DISCUSSION

The Commission's *Order* dismissing Brandenburg's Complaint with prejudice is based on three findings. The finding identified by the Commission as most important is that the portion of Attachment 3 to the interconnection agreement "that governs payment for terminating intralata toll traffic on the other's network is quite specific regarding what prices prevail." (*Order*, p. 9). As the Commission correctly notes in the *Order*, Attachment 3 states specifically that the party terminating switched access will receive from the originating party the rate set forth in AT&T Kentucky's access services tariff. (*Id.*) In other words, the portion of the interconnection agreement that specifically addresses toll traffic clearly contemplates a reciprocal arrangement in which *either* party that originates traffic pays the terminating party a single rate, which is set forth in AT&T Kentucky's tariff. Brandenburg did not challenge this aspect of the *Order*, nor can it, because the language of Attachment 3 of the interconnection agreement is clear beyond debate.

In the *Order*, the Commission also noted the fact that Brandenburg "only adopted the agreement and did not enter its own agreement with AT&T." (*Id.*). As the Commission observed, Brandenburg could have attempted to negotiate an agreement with different language, but it decided to forego the opportunity to do so, and instead, adopted an agreement that AT&T had entered into with another carrier. This fact undercuts Brandenburg's odd assertion that the application of the plain language of Attachment 3 constitutes an "attempted expansion of the agreements application beyond the territory *contemplated by AT&T and* Brandenburg." (Motion, p. 10) (emphasis added). To the contrary, Brandenburg and AT&T could not have

contemplated anything when the agreement was negotiated because there were no negotiations between these two entities. Instead, as AT&T Kentucky pointed out in its response to Brandenburg's Motion for Summary Judgment, the agreement was negotiated with Kentucky DataLink, and later adopted by Brandenburg. It is noteworthy that Kentucky DataLink has never attempted to construe the agreement as Brandenburg does. Likewise, none of the other carriers that have adopted similar agreements in Kentucky have ever made the argument Brandenburg makes. (AT&T Kentucky's Motion For Summary Judgment, p. 13). Brandenburg's Motion for Rehearing also does not address this portion of the Commission's ruling.

Instead, Brandenburg's Motion takes issue with only one of the Commission's three findings, the Commission's rejection of Brandenburg's interpretation of an undefined term in the interconnection agreement, *i.e.*, "BellSouth territory." Stated generally, Brandenburg's argument is that the general terms and conditions of the agreement contain a general statement that the agreement applies in AT&T Kentucky's territory. In Brandenburg's view, this means that Brandenburg is free to charge whatever terminating access rates it wishes, and to ignore the contrary language of Attachment 3, if it can concoct a theory whereby the transit of access traffic occurs outside of AT&T Kentucky's territory. To this end, Brandenburg glosses over the fact that the term "BellSouth territory" is not defined anywhere in the agreement and proposes a self-serving definition of this term that is not supported by any language in the agreement.

Further, Brandenburg mischaracterizes its approach as an effort to align two different provisions of the agreement. (Motion, pp. 5-6). To the contrary, what

Brandenburg attempts is to avoid the clear language in Attachment 3 that specifically applies to access services, by reference to two undefined words that appear in the general terms and conditions of the agreement. This attempt should be rejected because (1) it leads to an inequitable result that is clearly contrary to the intention of the parties that actually negotiated the agreement, and (2) because, from a practical standpoint, Brandenburg's argument makes no sense.

As AT&T Kentucky noted in its Response to Brandenburg's Motion for Summary Judgment, traffic delivered to Brandenburg actually goes to Brandenburg's affiliated independent telephone company, which shares a point of interconnection with AT&T Kentucky at the boundary line between the two companies. Thus, Brandenburg's only interconnection with AT&T Kentucky is through the facilities of an independent carrier having a service area adjacent to AT&T Kentucky's. This fact is important for two reasons: first, it shows that the distinction Brandenburg attempts to make between areas in which it competes with AT&T Kentucky and those in which it does not is a complete fiction. Second, it means that under Brandenburg's theory (that the location of the end user controls for the purpose of "locating" the transit function) all traffic that AT&T Kentucky terminates to Brandenburg's end users is terminated outside of AT&T Kentucky's territory, and Brandenburg can charge a higher rate for termination than the rate set forth in the interconnection agreement. At the same time, all Brandenburg traffic that terminates on the AT&T Kentucky network would be terminated inside AT&T Kentucky territory, and the lower termination rate set forth in the agreement would apply.

Thus, Brandenburg's approach abrogates the clear intent of Attachment 3 that either originating party will pay either terminating party the identical rate for traffic termination. Instead, under Brandenburg's approach, AT&T Kentucky would always pay Brandenburg a higher rate for termination than Brandenburg would pay AT&T Kentucky. There is absolutely nothing in the language of the interconnection agreement from which one could reach the conclusion that this inequitable result is what the actual parties that negotiated the agreement intended. To the contrary, the language of Attachment 3 clearly contemplates a *reciprocal* arrangement.

Beyond this, Brandenburg's Motion is composed of a lengthy discourse on the boundaries of AT&T Kentucky's service area. This discourse, however, completely misses the point. What determines the issue is not the physical boundaries of AT&T Kentucky's service area, but rather the fact that Brandenburg's efforts to "locate" access services are irreconcilable with the specific language of Attachment 3. Moreover, this approach simply does not work from a practical standpoint.

The fact that the agreement does not contain a definition of the term "BellSouth territory" is not surprising. The very general use of these words was obviously intended to mean that AT&T Kentucky can only provide in its own territory wholesale offerings that rely upon facilities that are placed in its territory. That is, AT&T Kentucky cannot provide unbundled network elements outside its service territory because it lacks the facilities to do so. In contrast, taking this general language and applying it to functions that cannot be isolated to a specific location, such as traffic exchange, leads to absurd results.

As Brandenburg acknowledges, the transport and exchange of traffic does not occur in a single location. (Motion, p. 6). The traffic that AT&T Kentucky terminates to Brandenburg customers either originates in AT&T Kentucky's territory or it originates outside of AT&T Kentucky territory and AT&T Kentucky merely performs a transit function. Either way, AT&T Kentucky carries this traffic through its territory, performing services within its territory, and delivers this traffic to Brandenburg. Thus, traffic that originates in AT&T Kentucky's territory and terminates in Brandenburg's territory clearly involves a process that takes place in the territory of both carriers. Given the nature of the transit function, the concept of locating it in AT&T Kentucky's territory, Brandenburg's territory, or any other specific physical location makes no sense. Brandenburg's assertion that the transit function in question must be treated as if it occurs solely outside of AT&T Kentucky's territory is equally nonsensical.

III. CONCLUSION

Brandenburg's Motion for Rehearing raises nothing other than arguments that Brandenburg has repeatedly made, and that the Commission has properly rejected. As the Commission noted, Attachment 3 to the agreement specifically sets forth the intention of the parties to this agreement to provide for a particular compensation rate that would be reciprocally applied. Brandenburg's efforts to twist the term "BellSouth territory" to defeat the clear language of Attachment 3, and to achieve a result in which Brandenburg would always receive a higher rate for terminating traffic than would AT&T Kentucky, must be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE -- KPSC 2006-00447

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by U.S. mail, this 11th day of February, 2008.

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