

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Mary.Keyer@BellSouth.com

Mary K. Keyer
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

December 8, 2006

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DEC 08 2006

**PUBLIC SERVICE
COMMISSION**

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

Re: Brandenburg Telecom LLC, Complainant v. BellSouth
Telecommunications, Inc., Defendant
PSC 2006-00447

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of BellSouth's Reply to Brandenburg's Response to BellSouth's Motion to Dismiss.

Also, please delete Eddy Roberts' name from the service list and add my name to the service list in this case.

Sincerely,


Mary K. Keyer

Enclosures

cc: Party of record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

DEC 08 2006

In the Matter of:

PUBLIC SERVICE
COMMISSION

BRANDENBURG TELECOM LLC)
Complainant)
v.)
BELLSOUTH TELECOMMUNICATIONS,)
INC.)
Defendant)
_____)

Case No. 2006-00447

**BELLSOUTH'S REPLY TO BRANDENBURG'S
RESPONSE TO BELLSOUTH'S MOTION TO DISMISS**

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files its Reply to the Response of Brandenburg Telecom LLC ("Brandenburg") to BellSouth's Motion to Dismiss the Complaint filed by Brandenburg in this proceeding, and states the following:

I. INTRODUCTION

Brandenburg's Complaint against BellSouth is a fundamentally disingenuous attempt to avoid its obligations under the Interconnection Agreement that BellSouth negotiated in good faith with Kentucky Data Link, and which Brandenburg voluntarily chose to adopt. Instead of honoring its commitments, Brandenburg now attempts to unilaterally impose upon BellSouth terminating switched access rates higher than the rates clearly set forth in the Interconnection Agreement between the Parties. To prevail in this attempt, Brandenburg must establish two things: (1) that the Interconnection Agreement does not apply, and (2) that Brandenburg's access tariff does apply. As a matter of law, Brandenburg cannot establish either requirement.

Not surprisingly, Brandenburg emphasizes in its Response that Motions to Dismiss are to be granted only when the Complainant cannot “prove any set of facts that would entitle [it] to relief.” (Brandenburg Reply, p. 2). BellSouth’s Motion to Dismiss meets this standard, and the Motion should be granted because (1) Brandenburg’s claim conflicts with the entire interconnection scheme of Section 251; (2) it relies upon an untenable interpretation of the controlling Interconnection Agreement; and (3) it relies upon the application of an access tariff that clearly does not apply.

II. THE INTERCONNECTION AGREEMENT SETS THE RATE FOR TERMINATING SWITCHED ACCESS

The Act clearly contemplates that ILECs and CLECs will enter into Interconnection Agreements that control the business relationship between them. Specifically, Section 251(a)(1) states that each telecommunications carrier has the duty to “interconnect directly or indirectly with the facilities of other telecommunications carriers.” Further, each local exchange carrier has “the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” (Section 251(b)(5)). Each ILEC has the additional duty to negotiate in good faith to reach agreement with each requesting telecommunications carrier and to enter into an Interconnection Agreement that includes, among other things, arrangements “for the transmission and routing of telephone exchange service and exchange access.” (Section 251(c)(2)(a) (emphasis added).

There is nothing in the language of the Act to suggest that Interconnection Agreements that parties enter into pursuant to the Act apply only to some transport, routing, traffic termination or access provided by the parties, but not to others. Instead, the Act contemplates that parties will negotiate and execute Interconnection Agreements that govern all aspects of their interconnection with one another. BellSouth and Kentucky Data Link negotiated a

comprehensive agreement of the sort described in the Act. Brandenburg made the voluntary decision to adopt this Agreement and all its terms. Now, however, Brandenburg attempts to avoid the clearly appropriate application of the Agreement and to unilaterally impose a higher rate for traffic termination than the reciprocal rate to which the Parties agreed.

Paradoxically, Brandenburg's Complaint cites to the operative language of the Interconnection Agreement that sets forth the reciprocal compensation arrangements that have been agreed to by the Parties. (Complaint, ¶ 9). The Agreement plainly states that each Party shall pay the other Party "terminating switched access tariff rates as set forth in BellSouth's Access Services Tariff ..." (Complaint, *Id.*, emphasis added.). Nevertheless, in an effort to avoid its obligations, Brandenburg has created an implausible interpretation of the Agreement in which, under Brandenburg's latest theory, the Agreement only applies to traffic that is terminated to customers within BellSouth's territory. Thus, Brandenburg claims that the higher access charges that appear in its Access Tariff apply to traffic terminated outside of BellSouth territory.

At the outset, one must view with skepticism any claim by Brandenburg as to the intention of the parties to the Agreement to create the peculiar result it advocates, given the fact that Brandenburg did not negotiate the Agreement. In fact, the CLEC that did negotiate the Agreement with BellSouth, Kentucky Data Link, has never asserted this interpretation.

Moreover, Brandenburg's interpretation of the Agreement draws no support from the actual language of the Agreement. Again, Brandenburg claims that the provisions relating to the exchange of access traffic are limited so that Brandenburg is free to charge BellSouth its higher, tariffed access rates for traffic that terminates to Brandenburg customers outside of BellSouth's territory. Brandenburg, however, skirts the fact that there is no such limitation in the language of

the Agreement that it quoted in its Complaint, or of any other point in Attachment 3 of the Agreement (which defines specifically the terms of the interconnection). Instead, Brandenburg premises its entire flawed contractual interpretation upon two words that appear in the General Terms and Conditions of the Agreement, the proviso that the Agreement applies in “BellSouth territory.”

Brandenburg ignores the fact that this term “BellSouth territory” is not defined in the Agreement in any way that would make it applicable to the termination of access traffic. Instead, Brandenburg proposes a series of changing (but uniformly self-serving) definitions of the term. In its complaint, Brandenburg first appeared to make a distinction between exchanges in which it chose to compete with BellSouth and those in which it did not in order to contend that the Agreement applies on an exchange by exchange basis and only in those exchanges in which Brandenburg serves local customers in direct competition to BellSouth’s local service offerings. (Complaint, ¶10). Other language in the Complaint made it seem that Brandenburg was arguing that if the point of interconnection is outside BellSouth’s service territory, then the Agreement does not apply. (Complaint, ¶12). Finally, Brandenburg raised for the first time in its Response a more refined version of its argument, in which it now contends that the Interconnection Agreement applies (or not) depending on the physical location of the particular end user. (Response, p.4). Brandenburg did not assert this newest definition at any point in the Complaint. The problem with this belatedly proposed definition (among other things) is that it is not articulated anywhere in the Interconnection Agreement. Instead, this “definition” is simply one proposed by Brandenburg after the fact in an effort to avoid its contractual obligations.

The absence in the Agreement of a definition of the term “BellSouth territory” is not surprising since it was obviously intended to mean that BellSouth can only provide in its own

territory wholesale offerings that rely upon facilities that are placed solely in its territory. For example, BellSouth cannot provide unbundled network elements outside its service territory because it lacks the facilities to do so. This general reference to BellSouth territory was never intended to make a distinction between access services in “competitive” areas, as opposed to “non-competitive” areas. If the Parties intended this result, then certainly language would have been added to Attachment 3 to make this clear.

Moreover, even if this limitation did apply, Brandenburg’s argument ignores entirely the fact that the function that BellSouth is performing does occur in BellSouth’s territory. The traffic that BellSouth terminates to Brandenburg customers either originates in BellSouth’s territory (and originates either from BellSouth or from another carrier who uses BellSouth’s transit services) or it originates outside of BellSouth territory and BellSouth simply performs a transit function. Moreover, of the traffic that BellSouth terminates to Brandenburg, some is originated by BellSouth customers, other traffic originates with CLEC and wireless customers, and still other traffic comes from the customers of independent carriers. BellSouth carries all this traffic through its territory, performing services within its territory, and delivers it to Brandenburg.¹ Brandenburg has chosen to adopt an Agreement whereby the Parties have provided (as required by the Act) for the intercarrier compensation applicable to this traffic as well as terms and conditions applicable to transit traffic. Nevertheless, Brandenburg now is attempting to “relocate” BellSouth’s functions to outside of BellSouth’s territory as a predicate to seizing upon essentially unrelated words in the General Terms and Conditions as a means to misinterpret the Agreement.

¹ Interestingly, Brandenburg has designated in the LERG that traffic destined for its end users be delivered to Brandenburg’s affiliated independent telephone company. That company shares a point of interconnection with BellSouth that is at the boundary line between the companies’ territories. Thus, the point of interconnection is in BellSouth’s territory.

III. BRANDENBURG'S ACCESS TARIFF DOES NOT APPLY

Again, to prevail, Brandenburg must sustain the unlikely argument that, not only does the Interconnection Agreement not apply, but that Brandenburg's access tariff does. However, as noted previously, Section 251 (b)(5) requires carriers to make arrangements to reciprocally compensate "for the transport and termination of telecommunications." (Emphasis added). Section 251(c)(2)(A) specifically states that agreements are to include provisions for exchange access. (Emphasis added). Thus, there is a distinction between access services that fall under the traditional access regime (which may be tariffed) and traffic exchange between CLECs and ILECs that is subject to the requirements of Section 251, and which must be dealt with in Interconnection Agreements, not in tariffs.² Thus, Brandenburg's attempt to levy access charges by a unilateral imposition of its access tariff plainly contradicts the requirements of the Act.

Moreover, a review of Brandenburg's access tariff makes clear that the tariff applies to the traditional access charge regime, not to interconnection between LECs. As BellSouth noted in its response, Brandenburg has a physical interconnection with BellSouth because it has opened NPA-NXX codes in its affiliated ICO's switch, and placed a notation in the Local Exchange Routing Guide ("LERG") to instruct carriers to route traffic to its ICO affiliate. Putting aside the propriety vel non of Brandenburg's creation of this type of "stealth interconnection," the arrangement is an indirect interconnection that is expressly covered by the Act, and by the requirements of the Interconnection Agreement. (*See*, Sec 251(a)(1)). In contrast, services charged pursuant to an access tariff apply when a carrier (such as an interexchange carrier (IXC))

² *See also*, In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, ¶¶ 14, 19-21 (2005). Although this case dealt specifically with CMRS traffic, the FCC stated that carriers may not use tariffs to charge for "non-access traffic," which the FCC defined as "traffic not subject to the interstate or intrastate access charge regime, including traffic subject to Section 251(b)(5) of the Act and ISP bound traffic." (*Id.*, fn. 6).

obtains access to the LEC's network, and ultimately to its customers, by purchasing specific access facilities from the LEC. Thus, there is also a fundamental mismatch between the manner in which access tariffs function and the situation to which Brandenburg is attempting to misapply its access tariff.

The fact that Brandenburg's access tariff does not apply is confirmed by a review of the tariff. Brandenburg's access tariff comprises 150 pages of descriptions of a variety of available switched access services.³ This tariff clearly states that the customer must follow a defined process to order switched access service. (Brandenburg Access Tariff, 6.1.2). Customers may order switched access service from four different feature group categories. (*Id.*, 6.1.1(A)). Each feature group has various options that can be ordered as part of the specific service arrangements. (*Id.*). Not surprisingly "rates and charges for Switched Access Service depend generally on the specific feature group ordered by the customer." (*Id.*, 6.1). Thus, when a Brandenburg customer buys switched access service from Brandenburg's tariff, it decides what specific access facilities it needs, orders them through a specifically defined process and pays a rate that depends on the particular facilities and service arrangement it chooses. Obviously, this process has no relationship whatsoever to the Act-mandated process whereby carriers exchange traffic and negotiate interconnection agreements to govern this exchange.

Further, even if Brandenburg's access tariff could apply, Brandenburg's actions – *i.e.*, attempting to force tariffed access charges upon BellSouth by manipulating its ICO-affiliate's connection with BellSouth – violate the ordering and provisioning requirements of its own tariff. Put differently, even if Brandenburg's access tariff were conceptually applicable (and it is not), it would still be necessary for BellSouth to place an order for access services prior to

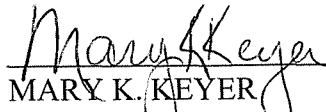
³ Brandenburg has adopted the access tariff of Duo County Cooperative Corp., Inc.

Brandenburg's provisioning of the service. The fact that Brandenburg never requested that BellSouth place such an order, and instead negotiated an Interconnection Agreement, demonstrates that Brandenburg knows that the Interconnection Agreement controls. Brandenburg's current assertion to the contrary is an unsustainable attempt to avoid its contractual obligations.

IV. CONCLUSION

Brandenburg's attempt to unilaterally apply its access tariff to charge a higher rate for traffic termination than the rate to which the Parties have agreed (1) contradicts the Act, (2) is unsupported by the language of the Agreement, (3) contradicts the decisions of the FCC, and (4) is inconsistent with the provisions of its own access tariff. For these reasons, this attempt must fail. Because Brandenburg cannot "prove any set of facts that would entitle [it] to relief," the Commission should grant BellSouth's Motion to Dismiss the Complaint with prejudice.

Respectfully submitted,



MARY K. KEYER
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40203
(502) 582-8219

J. PHILLIP CARVER
675 W. Peachtree Street, NW
Suite 4300
Atlanta, GA 30305
(404) 335-0710

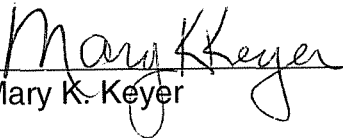
COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE FOR 2006-00447

It is hereby certified that a true and correct copy of the foregoing was served on the following individual by mailing a copy thereof on the 8th day of December, 2006.

John E. Selent
Dinsmore & Shohl LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202



Mary K. Keyer