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**RECEIVED**

JAN 30 2008

**PUBLIC SERVICE  
COMMISSION**

January 30, 2008

**VIA HAND-DELIVERY**

Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

**Re: *In the Matter of: Brandenburg Telecom LLC v. BellSouth Telecommunications, Inc.; Case No. 2006-00447***

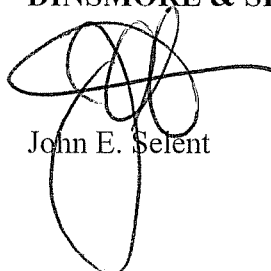
Dear Ms. O'Donnell:

We have enclosed, for filing with the Public Service Commission of the Commonwealth of Kentucky ("Commission"), an original and ten (10) copies, of Brandenburg Telecom LLC's Motion for Rehearing in the above-referenced matter.

Thank you, and if you have any questions, please call us.

Very truly yours,

**DINSMORE & SHOHL LLP**



John E. Selent

Enclosures

Hon. Beth O'Donnell  
January 30, 2008  
Page 2 of 2

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cc: All Parties of Record (w/ enclosures)  
Allison T. Willoughby (w/ enclosures)  
Edward T. Depp, Esq. (w/o enclosures)  
Holly C. Wallace, Esq. (w/o enclosures)

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JAN 30 2008

PUBLIC SERVICE  
COMMISSION

In the Matter of:

BRANDENBURG TELECOM LLC )  
Complainant )  
v. )  
BELLSOUTH TELECOMMUNICATIONS )  
INC. )  
Defendant )  
\_\_\_\_\_ )

Case No. 2006-00447

**BRANDENBURG TELECOM LLC'S MOTION FOR REHEARING**

Brandenburg Telecom LLC ("Brandenburg Telecom"), by counsel, and pursuant to KRS 278.400, and 807 KAR 5:001, respectfully moves the Public Service Commission of the Commonwealth of Kentucky (the "Commission") for rehearing of the Commission's January 7, 2008 order (the "Order") granting the motion to dismiss of BellSouth Telecommunications d/b/a AT&T Kentucky ("AT&T") and denying Brandenburg Telecom's motion for summary judgment. Brandenburg Telecom does not seek rehearing of the portion of the Order granting AT&T's motion to strike.

In support of its motion, Brandenburg Telecom states as follows.

**INTRODUCTION**

Brandenburg Telecom and AT&T are involved in a dispute regarding the payment of access charges by AT&T to Brandenburg Telecom for certain access services AT&T obtains from Brandenburg Telecom. AT&T argues that the terms and conditions of its competitive interconnection agreement with Brandenburg Telecom should govern the terms of Brandenburg Telecom's provision of access services, including rates.

Brandenburg Telecom contends that the terms and conditions of its intrastate access charge tariff determine the charges to be paid by AT&T in areas in which AT&T does not operate as a local exchange carrier.<sup>1</sup>

On October 12, 2006, Brandenburg Telecom filed a complaint against AT&T with the Commission, alleging that the interconnection agreement between Brandenburg Telecom and AT&T (the "Agreement"), adopted on April 26, 2005, only applies within AT&T's territory. That is, it only applies in those areas in which AT&T is the ILEC and competes, as a LEC, with Brandenburg Telecom. On October 20, 2006, AT&T filed, along with its answer, a motion to dismiss Brandenburg Telecom's complaint, alleging that there is no distinction between competitive and non-competitive traffic in the Agreement and that AT&T's switched access tariff rates apply wherever Brandenburg Telecom and AT&T exchange traffic. On June 20, 2007, Brandenburg Telecom filed its motion for summary judgment. On January 7, 2008, the Commission granted AT&T's motion to dismiss, denied Brandenburg Telecom's motion for summary judgment, and dismissed Brandenburg Telecom's complaint with prejudice.

In granting AT&T's motion to dismiss and denying Brandenburg Telecom's motion for summary judgment, the Commission held that "the term 'territory,' in the context of the Agreement, does not connote a particular geographic limitation and is not specific enough to support Brandenburg [Telecom]'s argument [that the Agreement only applies in those areas in which Brandenburg Telecom and AT&T exchange competitive traffic]." (Order, p. 9.) Relying on Section 8.1.6.1 of Attachment 3 to the Agreement (hereinafter "Section 8.1.6.1"), which provides that, "for terminating its intraLATA toll

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<sup>1</sup> The application of access charges by Brandenburg Telecom to AT&T is in dispute in areas including Elizabethtown, Kentucky, for example, where Brandenburg Telecom provides competitive local exchange carrier service but AT&T does not serve as a local exchange carrier

traffic on the other [p]arty's network, the originating [p]arty will pay the terminating [p]arty [AT&T]'s current intrastate or interstate...terminating switched access tariff rates as set forth in [AT&T]'s Access Services Tariffs," the Commission held that, "judging from the plain text of [Section 8.1.6.1], the rates found in AT&T's Access Services Tariffs are to be charged for terminating toll traffic, regardless of where the termination occurs." (Id.)

Brandenburg Telecom believes that the Commission erred in granting AT&T's motion to dismiss because there remain genuine issues of material fact regarding whether the Agreement governs the terms and conditions, including rates, under which Brandenburg Telecom terminates access traffic of AT&T outside of the territory in which AT&T operates as an ILEC. 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. Therefore, dismissal of Brandenburg Telecom's complaint is improper. *See Henderson v. Thomas*, 129 S.W.3d 853, 855 (Ky. App. 2004) ("In considering the propriety of a[n]...order terminating the litigation on a motion to dismiss, the moving party is not entitled to judgment unless it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him to relief."). The Commission should reconsider that portion of its order that holds that, no matter where termination occurs, AT&T's Access Services Tariff rates are applicable for terminating toll traffic exchanged between AT&T and Brandenburg Telecom.

### **ARGUMENT & ANALYSIS**

Pursuant to KRS 278.400, after a determination has been made by the Commission in any hearing, any party to the proceeding may move for a rehearing

regarding "any of the matters determined" within twenty (20) days after service of the order. Upon the rehearing, the Commission may change, modify, vacate, or affirm its previous order and enter such other orders as it deems necessary. KRS 278.400. While the statute does not set forth specific grounds for relief from an order, in a judicial forum, a motion to alter, amend, or vacate may be granted when necessary to correct errors of law or fact upon which a judgment is based or to prevent injustice. *See, e.g., Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). The Commission's January 7, 2008 order contains errors of law and fact and threatens injustice to Brandenburg Telecom. Accordingly, the Order should be vacated in part.

**I. The Agreement Only Applies Within AT&T Territory.**

The Commission relied on Section 8.1.6.1 in determining that, no matter where termination of intraLATA toll traffic occurs, AT&T's Access Services Tariff rates apply. As a result, the Commission incorrectly converted the Agreement into a statewide access agreement, expanding the geographical range of the Agreement far beyond that agreed to by Brandenburg Telecom and AT&T.

While the plain language of Section 8.1.6.1 requires that the rates set forth in AT&T's Access Services Tariffs are to be charged for terminating toll traffic, this section must be read in conjunction with the remainder of the Agreement. Under Kentucky law, contracts "[are to] be construed as a whole, giving effect to all parts and every word in [them] if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986); *U.S. v. Hardy*, 916 F.Supp. 1373, 1380 (W.D.Ky. 1995). Section 2.1 (hereinafter "Section 2.1") of the General Terms and Conditions of the Agreement provides that "th[e] Agreement...shall apply to [AT&T] territory in the state(s) of...Kentucky." This

language clearly specifies the scope of the Agreement, and, as such, it preempts any interpretation that language in an attachment to the Agreement — particularly language that does not purport to expand or contradict the language of Section 2.1 — expands the applicability of the Agreement to locations outside "AT&T territory in the state(s) of...Kentucky."

Accordingly, when either Brandenburg Telecom or AT&T terminates intraLATA toll traffic in AT&T territory, the Agreement applies, and that party shall pay to the other party the rates set forth in AT&T's Access Services Tariff. On the other hand, when Brandenburg Telecom terminates AT&T intraLATA toll traffic outside of AT&T territory, the Agreement does not apply and AT&T is required to pay to Brandenburg Telecom the rates set forth in Brandenburg Telecom's tariff. That is the only logical interpretation of the Agreement when the plain language of Section 8.1.6.1 is read in conjunction with Section 2.1, as is required by Kentucky law. There can be no expectation that AT&T and Brandenburg Telecom intended to apply the AT&T tariff in areas in which that tariff does not, on its face, apply and no tariffed rates exist.

Furthermore, as noted previously by Brandenburg Telecom, if the Agreement was meant to apply statewide, Section 2.1 would read "this Agreement...shall apply in the state(s) of...Kentucky," instead of "this Agreement...shall apply to the [AT&T] territory in the state(s) of...Kentucky." The term "[AT&T] territory" is superfluous, and of no effect, if the Agreement is truly statewide in application. The Commission must give effect to all terms in a contract. *See L.K. Comstock & Co., Inc. v. Becon Constr. Co.*, 932 F.Supp. 948, 967 (E.D.Ky. 1994) (Under Kentucky law, "an interpretation which gives...effective meaning to all the terms [in a contract] is preferred to an interpretation

which leaves a part...of no effect."). By ordering that Section 8.1.6.1 applies on a statewide basis, the Commission has rendered Section 2.1 meaningless. Therefore, the Commission should grant rehearing and deny AT&T's motion to dismiss.

AT&T alleges that the general use of the term "[AT&T] territory" was intended to mean that AT&T "can only provide in its own territory wholesale offerings that rely upon facilities that are placed solely in its territory." (BellSouth's Response to Brandenburg's motion for summary judgment, p. 10.) As an example, AT&T alleges that it cannot provide unbundled network elements outside its service territory because it lacks the facilities to do so. (*id.*) In addition to the fact that there is no language in the Agreement that provides that the term "[AT&T] territory" refers only to wholesale offerings, AT&T's argument is nonsensical.

If, by the very nature of a particular service, AT&T can only provide that particular service within AT&T territory, there is no reason to explicitly limit the application of the Agreement, with respect to that service, "to...[AT&T] territory." Such a limitation is redundant and the Agreement could be limited just as effectively with language that reads "this Agreement shall apply in the state of Kentucky."

Lastly, it is precisely because the transport and exchange of traffic does not occur in a single geographical location that the limitation of the Agreement to "[AT&T] territory" is necessary. As Brandenburg Telecom has previously noted, it is immaterial whether intraLATA traffic transits through AT&T territory; what matters, under Section 8.1.6.1, is the location of termination, which is the location of the recipient end user. Access services are provided at termination points — nowhere else.<sup>2</sup> When the recipient

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<sup>2</sup> With respect to that intraLATA traffic at issue in this matter, Brandenburg Telecom is providing access services to AT&T at a termination point located in Brandenburg Telecom's service area.



end user is located outside of AT&T territory, the rates in AT&T's Access Services Tariffs simply do not apply.

**II. AT&T Territory is Limited to Those Areas in Which AT&T Operates as an ILEC.**

The Commission's holding that the term "territory," in the context of the Agreement, "does not connote a particular geographic limitation" has no basis in the law. The term "[AT&T] territory," as used in the agreement, is geographically limited to the area in which AT&T operates as an incumbent local exchange carrier ("ILEC").

In the absence of ambiguity, a written instrument is to be enforced strictly according to its terms, *Davis v. Siemens Med. Solutions USA, Inc.*, 399 F.Supp.2d 785, 792 (W.D.Ky. 2005), and, absent context which indicates a contrary intent, an instrument's terms are to be given their "usual and ordinarily understood meaning." *Kroger Grocery & Baking Co. v. City of Cynthiana*, 42 S.W.2d 904, 705 (Ky. 1931). Ambiguity only exists if a reasonable person would find that a term is susceptible to different or inconsistent interpretations. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W. 3d 381, 385 (Ky.App. 2002). There being only one reasonable interpretation of the meaning of "[AT&T] territory," the term is not ambiguous. Therefore, the term "AT&T territory" should be given its usual and ordinarily understood meaning and that is the territory in which AT&T acts as an ILEC, and not elsewhere. (In fact, it stretches reason to conclude, as the Order does, that AT&T territory includes those portions of Brandenburg Telecom's service area in which Windstream Kentucky East operates as the ILEC — areas where AT&T does not, and cannot, provide local exchange carrier service for the termination of intraLATA toll traffic.)

AT&T is defined in the Agreement as a "local exchange telecommunications company." AT&T is technically an ILEC, as that term is defined in 47 U.S.C. § 251(h), reproduced here:

(h) Definition of Incumbent Local Exchange Carrier.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, *with respect to an area*, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996 [47 U.S.C §§ 153 *et seq.*], provided telephone exchange service *in such area*; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the [Federal Communications] Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i). (Emphasis added.)

As is evident in the definition of ILEC, a local exchange carrier can only be an ILEC in a defined area. Furthermore, under 807 KAR 5:061, Section 1(13), an "exchange" is a "geographical area established by a [LEC] for the administration of telephone service. (emphasis added.)" Therefore, if the term "AT&T territory" is given its usual and ordinary meaning, it refers to the geographical area/exchanges in which AT&T operates as an ILEC.

The Commission is well aware of the geographical area/exchanges in which AT&T is authorized to operate as an ILEC. The Commission reviewed both written descriptions of the exchanges in which AT&T operates as an ILEC and exchange maps that show the "current exchange service area(s) for each telephone exchange operated [by

AT&T]," as required by 807 KAR 5:061, Sections 6(1) and 7, prior to approving AT&T's General Subscriber Services Tariff.

Rather than reproduce the lengthy portions of AT&T's tariff that specify the exchanges in which AT&T operates as an ILEC, Brandenburg Telecom refers the Commission to the "Kentucky Exchange Boundaries" map, attached to this motion as Exhibit 1. This Commission-generated map depicts the exchanges (and exchange boundaries) in Kentucky and the ILECs serving each exchange. As is evident, AT&T does not operate as an ILEC in the entire state. The Agreement does not apply in those exchanges, as indicated on the attached map, in which AT&T does not operate as an ILEC.

AT&T does not operate as an ILEC in the Elizabethtown exchange. Therefore, the Elizabethtown exchange is not in AT&T territory and the Agreement does not apply to the Elizabethtown exchange. As a result, the rates in AT&T's Access Services Tariff do not apply to intraLATA traffic exchanged between Brandenburg Telecom and AT&T that terminates in the Elizabethtown exchange.

Furthermore, AT&T does not provide or offer to provide access service in the Elizabethtown exchange, and AT&T's Access Services Tariff does not set forth rates for terminating toll traffic to end users in the Elizabethtown exchange. Therefore, there are no AT&T tariff rates to apply to the intraLATA toll traffic originated by AT&T and terminated by Brandenburg Telecom in the Elizabethtown exchange. There is no provision in the Agreement that suggests that application of AT&T's access tariff was to be extended to areas outside of AT&T's territory — areas in which its access tariff would not otherwise apply.

Through the attempted expansion of the Agreement's application beyond the territory contemplated by AT&T and Brandenburg Telecom, AT&T is, in effect, expanding the terms and conditions of its Access Services Tariff beyond those approved by the Commission, in violation of 807 KAR 5:011, Section 6(1) ("No tariff may be changed...except on such terms and conditions as the Commission may impose.").


As a result, AT&T is attempting to pay Brandenburg Telecom less than AT&T pays Windstream Kentucky East to terminate intraLATA traffic in the same exchange and, in fact, less than any other telecommunications service provider pays to terminate intraLATA traffic in that exchange. Accordingly, the Commission, by its Order, has, in effect, granted AT&T a competitive advantage over all other carriers.

AT&T is, once again, attempting to execute an end run around the Commission to expand its market dominance. The Commission should rehear and redetermine this matter to avoid this unlawful result.

### **CONCLUSION**

The interconnection agreement between Brandenburg Telecom and BellSouth Telecommunications d/b/a AT&T Kentucky only applies in AT&T territory and AT&T territory is limited to those areas in which AT&T operates as an ILEC. The interconnection agreement between AT&T and Brandenburg Telecom should not be construed as a statewide access agreement requiring the payment of AT&T's access charges when a telephone call terminates outside of AT&T territory. For these reasons, the Commission should vacate the portion of its January 7, 2008 order that grants AT&T's motion to dismiss and denies Brandenburg Telecom's motion for summary judgment.

Respectfully submitted,

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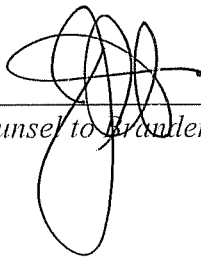
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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following this 30~~th~~ day of January, 2008:

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




















  
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*Counsel to Brandenburg Telecom LLC*

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# Kentucky Exchange Boundaries

An exchange contains at least one switching center and its boundary encloses the approximate area that it serves. An exchange boundary is associated with an incumbent local exchange carrier (ILEC), which is a local telephone company. Area codes and LATAs follow exchange boundaries.

-  Exchange Boundaries
-  AT&T Kentucky
-  Ballard Rural Telephone Cooperative
-  Brandenburg Telephone Company, Inc.
-  Cincinnati Bell Telephone Company
-  Coalfields Telephone Company
-  Duo County Telephone Cooperative
-  Footfalls Rural Telephone
-  Highland Telephone Cooperative
-  Leslie County Telephone Company, Inc.
-  Lewisport Telephone Company, Inc.
-  Logan Telephone Cooperative, Inc.
-  Mountain Telephone Cooperative, Inc.
-  North Central Telephone
-  Peoples Rural Telephone
-  Salem Telephone Company
-  South Central Rural Telephone
-  Thacker-Grisby Telephone
-  West Kentucky Rural Telephone
-  Windstream Kentucky East
-  Windstream Kentucky West



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