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August 9, 2007

**RECEIVED**

AUG 10 2007  
PUBLIC SERVICE  
COMMISSION

**Via Federal Express**

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:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of Brandenburg Telecom LLC's Reply in Support of its Verified Motion for Summary Judgment. Please return a file-stamped copy in the self-addressed, postage prepaid envelope furnished herewith.

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

Sincerely,

DINSMORE & SHOHL LLP



Holly C. Wallace

HCW/rk  
Enclosure  
cc: All Parties of Record

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:

AUG 10 2007

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

PUBLIC SERVICE  
COMMISSION

Case No. 2006-00447

**BRANDENBURG TELECOM'S REPLY IN SUPPORT OF ITS  
VERIFIED MOTION FOR SUMMARY JUDGMENT**

Brandenburg Telecom LLC ("Brandenburg Telecom"), by counsel, hereby files its reply in support of its verified motion for summary judgment on its claims against BellSouth Telecommunications, Inc. ("BellSouth") for past due tariffed charges in the amount of \$160,530.66 as of the July 8, 2007 billing, and for the payment of future tariffed charges as they become due. In support of its reply, Brandenburg Telecom states as follows.

**INTRODUCTION**

Despite the fact that an interconnection agreement ("Agreement") between BellSouth and Brandenburg Telecom is clearly limited in application to areas in which BellSouth and Brandenburg Telecom exchange competitive traffic, BellSouth construes the Agreement as having statewide applicability and, therefore, refuses to abide by the terms of Brandenburg Telecom's filed and approved access tariff.

Because of its failure to abide by the terms of Brandenburg Telecom's tariff and failure to pay tariffed access charges, BellSouth owes Brandenburg Telecom

\$160,530.66, as of the July 8, 2007 billing. There are no genuine issues of material fact. Therefore, the Kentucky Public Service Commission ("Commission") should grant Brandenburg Telecom's motion for summary judgment and order BellSouth to pay the past due access charges and future access charges as they become due.

### ARGUMENT AND ANALYSIS

#### **I. BRANDENBURG TELECOM'S VERIFIED MOTION FOR SUMMARY JUDGMENT IS PROCEDURALLY SOUND.**

Though the Kentucky Revised Statutes provide that the Commission is not bound by Civil Rule 56,<sup>1</sup> BellSouth devotes a large portion of its response to pontificating on the technicalities of the standard for summary judgment.

Brandenburg Telecom recognizes that the Commission looks to the Civil Rules for guidance<sup>2</sup> and that the standard for summary judgment is well-established. Simply put, summary judgment is appropriate when there are no genuine issues of material fact with regard to a claim or defense, and the movant is entitled to judgment as a matter of law. *Continental Casualty Co. v. Belknap Hardware and Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1995). As Brandenburg Telecom establishes in Section II of this reply, the facts supporting Brandenburg Telecom's claim are undisputed. Accordingly, summary judgment is appropriate in this case.

Nonetheless, in an effort to obfuscate the central issue in this matter—that BellSouth refuses to pay Brandenburg Telecom for switched access services provided by

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<sup>1</sup> As per KRS 278.310, "all hearings and investigations before the Commission or any commissioner shall be governed by rules adopted by the Commission, and in the conduct thereof, neither the Commission nor the commissioner shall be bound by the technical rules of legal evidence."

<sup>2</sup> *In the Matter of: Ballard Rural Telephone Cooperative Corporation, Inc. v. Jackson Purchase Energy Corporation*, Case No. 2004-00036, 2005 Ky. PUC LEXIS 277 \*11 (March 23, 2005) ("The Commission has not established a rule that explicitly governs summary judgment; therefore, in determining whether to summarily dispose of this proceeding, we are guided by Civil Rule 56 and the principles established by the courts resolving motions for summary judgment.")

Brandenburg Telecom—BellSouth raises a series of claims regarding alleged procedural issues with Brandenburg Telecom’s motion for summary judgment. All of the procedural claims raised by BellSouth are groundless.

**A. Brandenburg Telecom’s Motion for Summary Judgment is Timely.**

BellSouth claims that Brandenburg Telecom’s motion for summary judgment is premature because "there has been no discovery and there is no record." (BellSouth’s Response to Brandenburg’s Motion for Summary Judgment ("BellSouth’s Response"), p. 5.) BellSouth’s claim is disingenuous.

On February 7, 2007, Brandenburg Telecom moved the Commission to enter a procedural schedule “providing for discovery [and] direct and rebuttal testimony.” (Brandenburg Telecom’s Motion for (1) Informal Conference and (2) Procedural Schedule, p. 2.) BellSouth objected to the motion and requested that the Commission deny it. (February 23, 2007 letter from Mary Keyer to Beth O’Donnell.) Having objected to Brandenburg Telecom’s motion to establish a procedural schedule for discovery, BellSouth cannot now complain that, because the parties have not engaged in discovery, Brandenburg Telecom’s motion for summary judgment is premature.<sup>3</sup> Moreover, as Brandenburg Telecom shall establish below, there is evidence of record supporting Brandenburg Telecom’s motion for summary judgment. Therefore, BellSouth’s argument is without merit.

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<sup>3</sup> In addition, BellSouth has not submitted an affidavit of counsel that it requests discovery. See, *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 229 (3d. Cir. 1987) (party opposing motion for summary judgment must submit “affidavits . . . that he cannot for reasons stated present by affidavit *facts* essential to justify his opposition”) (emphasis in original); and *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (opposing party must provide an “affidavit pursuant to CR 56.06”).

**B. Brandenburg Telecom's Motion for Summary Judgment is Properly Verified.**

BellSouth also complains about Brandenburg Telecom's verified statement of facts, claiming that it "clearly falls short of...legal requirements" and "falls short of the requirement that all affidavits be made on personal knowledge." (BellSouth's Response, pp. 5-6.)

The verified statement of facts identified Allison Willoughby, President of Brandenburg Telecom, by both name and title. Ms. Willoughby swore, before a notary, that the allegations and statements in the verified statement of facts were true and correct to the best of her knowledge, information, and belief. Although, pursuant to KRS 278.310, the Commission is not bound by the technicalities of CR 56.05 regarding the form of affidavits, Ms. Willoughby's sworn testimony based on her knowledge satisfies this civil rule, which requires that testimony be based on an individual's "personal knowledge."

Moreover, the Civil Rules do not require that a motion for summary judgment be supported by an affidavit. "A party seeking to recover upon a claim, . . . may . . . move with or without supporting affidavits for a summary judgment in his favor." (Emphasis added.) CR 56.01. Thus, Brandenburg Telecom's verified motion for summary judgment is procedurally sufficient.

**C. The Verified Statement of Facts Supports Brandenburg Telecom's Motion for Summary Judgment.**

BellSouth also complains that the statement of facts "contains virtually nothing in the way of actual facts" (BellSouth's Response, p. 6), alleging instead that it is "composed entirely of citation to extrinsic documents...and conclusory allegations that are asserted

without the benefit of any specific supporting facts." (Id.) Contrary to BellSouth's assertion, however, the verified statement of facts consists of the undisputed material facts in this case.

The only allegedly "extrinsic" document referenced in the verified statement of facts (other than the Complaint) is the interconnection agreement between the parties. The Agreement is filed with and approved by the Commission and is published on the Commission's website. "It is a well-established principle that a court will take judicial notice of its own records in the case before it and of all matters patent on the face of such records, including all prior proceedings in the same case." *Adkins v. Adkins*, 574 S.W.2d 898, 899 (Ky. App. 1978), *citing Maynard v. Allen*, 124 S.W.2d 765 (Ky. 1939). Thus, the Commission may take judicial notice of the Agreement.

BellSouth's complaints about the verified statement of facts are unwarranted and intended to distract the Commission's attention from the central, critical issue in this case—BellSouth's failure to pay Brandenburg Telecom for access traffic.

**II. BRANDENBURG TELECOM HAS SATISFIED THE ELEMENTS OF ITS CLAIM; THEREFORE, SUMMARY JUDGMENT IS APPROPRIATE.**

To prevail on its motion for summary judgment, Brandenburg Telecom must establish that: (1) Brandenburg Telecom's access tariff applies to traffic exchanged between Brandenburg Telecom and BellSouth in areas in which they do not exchange competitive traffic; and (2) BellSouth has not paid Brandenburg Telecom's tariffed rates for that traffic. Brandenburg Telecom has established both elements; therefore, summary judgment is appropriate.

**A. Brandenburg Telecom's Access Tariff Applies to the Exchange of Non-Competitive Traffic Between BellSouth and Brandenburg Telecom.**

The interconnection agreement between BellSouth and Brandenburg Telecom is limited in application to BellSouth territory, it does not address the exchange of access traffic in areas where the carriers do not exchange competitive traffic. Therefore, as explained below, Brandenburg Telecom's access tariff applies.

**i. The Telecommunications Act of 1996 Does Not Require that Interconnection Agreements Address the Exchange of Access Traffic Between Carriers.**

Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") requires that local exchange carriers ("LECs") "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Similarly, 47 CFR § 51.703 requires that LECs "establish reciprocal compensation arrangements for [the] transport and termination of telecommunications traffic with any requesting telecommunications carrier." Interstate or intrastate exchange access traffic, however, is not included in the definition of telecommunications traffic subject to those requirements. 47 CFR § 51.701(b)(1) ("For purposes of this subpart, telecommunications traffic means: Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate access." (Emphasis added.))

Therefore, carriers are not required to establish reciprocal compensation arrangements for the transport and termination of interstate or intrastate exchange access traffic or address the exchange of such traffic in interconnection agreements.

**ii. The Interconnection Agreement Between BellSouth and Brandenburg Telecom Does Not Apply to Traffic Exchanged Between Brandenburg Telecom and BellSouth in Areas in Which They Do Not Exchange Competitive Traffic.**

Understanding that, under the Act, interconnection agreements are not required to address the exchange of access traffic, the question becomes, "Does the interconnection agreement between BellSouth and Brandenburg Telecom address the access traffic for which Brandenburg Telecom seeks payment?" The answer is no, because Brandenburg Telecom is only seeking payment for access charges that result from the exchange of traffic that occurs outside of "BellSouth territory"—charges that are not addressed in the Agreement.

The scope of the Agreement is expressly limited to "BellSouth territory in the state[s] of...Kentucky." (Agreement, General Terms and Conditions, § 2.1, p. 3.) BellSouth claims that the term "BellSouth territory" reflects that BellSouth can only provide certain wholesale offerings where certain BellSouth facilities are located." (BellSouth's Response, p. 10.) BellSouth's argument is a red herring. First, this matter concerns exchange access traffic, not wholesale offerings. Second, there is no language in the Agreement that provides that the term "BellSouth territory" refers to wholesale offerings. Courts "will not make contracts for the parties, nor rewrite the contract for the parties." *California Union Ins. Co. v. Spade*, 642 S.W.2d 582, 583 (Ky. 1982). "[W]here a contract is free from ambiguity, 'it needs no construction and will be performed or enforced in accordance with its express terms.'" *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2001) (quoting *Ex Parte Walker's Ex'r*, 68 S.W.2d 745, 747 (Ky. 1933)). Nothing within the express terms of the Agreement indicates that "BellSouth territory" refers to wholesale offerings. Rather, the



express terms of the Agreement provide that the Agreement is limited in scope to BellSouth territory—that is, areas where BellSouth is the incumbent and competes with Brandenburg Telecom. (Agreement, General Terms and Conditions, § 2.1, p. 3.)

BellSouth also claims that all traffic terminated to Brandenburg Telecom by BellSouth is carried "through" BellSouth territory at some point and therefore occurs within BellSouth territory. (BellSouth's Response, p. 11). There are two principal difficulties with BellSouth's argument. First, if any and all traffic carried by BellSouth, regardless of where it originates or terminates, is located within BellSouth territory, then BellSouth's handling of traffic would be synonymous with BellSouth territory and there would be no need to expressly limit the scope of the Agreement to "BellSouth territory." Under Kentucky law, contracts "must be construed as a whole, giving effect to all parts and every word in [them] if possible." *U.S. v. Hardy*, 916 F.Supp. 1385, 1380 (W.D.Ky. 1995). BellSouth's interpretation renders the term "BellSouth territory" superfluous, and as such violates basic principles of contract law.

The second difficulty with BellSouth's interpretation is that it ignores that this matter concerns *terminating* access traffic. It is axiomatic that the location of the recipient end user determines the location of the terminating access traffic. Thus, it is immaterial whether the traffic transits through BellSouth territory. BellSouth's argument is nothing more than a red herring. Additionally, if the Agreement was intended to apply to the entire Commonwealth of Kentucky, Section 2.1 would have read "...shall apply in the state(s) of...Kentucky..." rather than the more limiting "...shall apply to the BellSouth territory in the state(s) of...Kentucky." (Emphasis added.)

Ultimately, despite its best efforts, BellSouth cannot rely on the fact that the term "BellSouth territory" is undefined in the Agreement to convert it into a statewide access agreement. The term "BellSouth territory" is unambiguous and serves to limit the application of the Agreement to traffic that occurs in areas where BellSouth is the incumbent local exchange carrier. "In the absence of ambiguity, a written instrument will be enforced strictly according to its terms." *Frear v. P.T.A. Indus.*, 103 S.W.3d 99, 106 (Ky. 2003), *quoting Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965). Accordingly, traffic that occurs in areas where BellSouth and Brandenburg Telecom do not exchange competitive traffic is not addressed in the Agreement, and is subject to the terms of Brandenburg Telecom's access tariff.

**iii. Because the Interconnection Agreement Does Not Apply to Traffic Exchanged Between Brandenburg Telecom and BellSouth in Areas in Which They Do Not Exchange Competitive Traffic, Brandenburg Telecom's Access Tariff Applies.**

Because the Interconnection Agreement does not address the exchange of access traffic in areas in which BellSouth and Brandenburg Telecom do not compete, Brandenburg Telecom is required to bill the rates it has on file with the Commission, in accordance with the filed-rate doctrine. *See* KRS 278.160. The rates on file with the Commission are those rates detailed in Brandenburg Telecom's filed and Commission-approved access tariff. The Commission's approval of Brandenburg Telecom's access tariff "establishe[d] the lawfulness of [that] rate" and, "unless and until [that rate] is set aside or removed, [it] remains for all purposes, the legal rate," in accordance with the filed-rate doctrine. *Daleure v. Kentucky*, 119 F.Supp.2d 683, 689 (W.D.Ky. 2000). "The filed rate is the only legal rate" and Brandenburg is, therefore, required to charge that rate. *Id.*

BellSouth incorrectly claims that the filed-rate doctrine does not apply, alleging that Brandenburg Telecom's access tariff applies only to IXCs, not other local exchange companies. (BellSouth's Response, p. 18.) BellSouth cannot hide behind the "local exchange carrier" label to avoid application of the filed-rate doctrine. In exchanges in which BellSouth and Brandenburg Telecom do not compete, BellSouth delivers interexchange traffic to Brandenburg Telecom and Brandenburg Telecom's access tariff governs the exchange of that traffic. Therefore, under the filed-rate doctrine, Brandenburg Telecom is required to charge BellSouth the tariffed access rates charged to all other carriers delivering interexchange traffic.

Moreover, for the three years immediately prior to Brandenburg Telecom's adoption of the Agreement, it provided BellSouth with switched access services pursuant to its access tariff, without incident. Never in that time did the parties require an interconnection agreement or reciprocal compensation arrangements to exchange access traffic. The fact that BellSouth and Brandenburg Telecom later executed an interconnection agreement governing the exchange of local traffic does not affect the applicability of the access tariff that was effectively applied to the exchange of access traffic for those preceding three years.

Interconnection agreements are not required to address exchange access traffic and Brandenburg Telecom's access tariff applies to the traffic at issue in this case. As a result, Brandenburg Telecom has satisfied the first of the two elements it must satisfy to prevail on its motion for summary judgment.

**B. BellSouth Has Not Paid Brandenburg Telecom's Tariffed Rates for Traffic Exchanged Between the Two Parties in Areas in Which They Do Not Exchange Competitive Traffic.**

In Brandenburg Telecom's verified motion for summary judgment, Ms. Allison Willoughby attested, under oath, that "As of the time of [the motion's] filing, BellSouth owe[d] Brandenburg Telecom in excess of \$157,588.57 for switched access services provided by Brandenburg Telecom." (Brandenburg Telecom's Verified Motion for Summary Judgment, p. 3.) Notably absent from BellSouth's response to Brandenburg Telecom's verified motion for summary judgment is a claim that BellSouth has made *any* payment to Brandenburg Telecom for terminating the access traffic addressed in this dispute. *See Gevedon v. Grigsby*, 303 S.W.2d 282, 284 (Ky. 1957) ("affidavits [that are not] countered...clearly pierce the pleadings which is one of the purposes of summary judgment procedure."). Therefore, it is an uncontroverted fact that BellSouth has not paid Brandenburg Telecom for terminating access traffic in areas where Brandenburg Telecom and BellSouth do not exchange competitive traffic, and, as a result, BellSouth owed Brandenburg Telecom in excess of \$157,588.87 at the time Brandenburg Telecom filed its verified motion for summary judgment. That amount increases on a monthly basis and totaled \$160,530.66 as of the July 8, 2007 billing.

Brandenburg Telecom has satisfied the second and final element of its claim. Accordingly, the Commission should grant Brandenburg Telecom summary judgment on the issue of BellSouth's unpaid access charges.

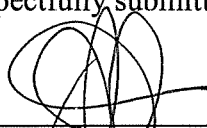
## CONCLUSION

BellSouth is attempting to convert a limited interconnection agreement into a statewide access agreement and the Commission should prevent such an abuse of power.

Interconnection agreements are not required to address tariffed access services. The Agreement between BellSouth and Brandenburg Telecom does not address switched access services provided in exchanges in which BellSouth and Brandenburg Telecom do not exchange competitive traffic. Therefore, the filed-rate doctrine requires BellSouth to pay access charges pursuant to Brandenburg Telecom's filed and approved tariff. Because of its failure to pay for these charges, BellSouth owes Brandenburg Telecom \$160,530.66, as of the July 8, 2007 billing, and additional access charges are accruing monthly.

Moreover, there are no genuine issues of material fact. Therefore, the Commission should grant Brandenburg Telecom's verified motion for summary judgment against BellSouth and order BellSouth to pay Brandenburg Telecom the charges it owes for the access services provided by Brandenburg Telecom (\$160,530.66) and charges for future access services as they become due.

Respectfully submitted,



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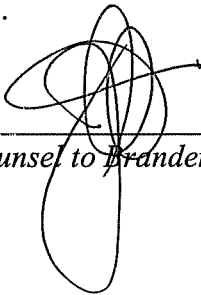
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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following this 9<sup>th</sup> day of August, 2007:

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