

**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

June 8, 2007

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

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JUN 08 2007

PUBLIC SERVICE  
COMMISSION

Re: BellSouth Telecommunications, Inc., Complainant v. Brandenburg  
Telephone Company, Defendant  
PSC 2006-00546

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth's Response to Brandenburg's Motion for Partial Summary Judgment filed on May 15, 2007.

Sincerely,

  
Mary K. Keyer

cc: Parties of Record

679254

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 2006-00546
	)	
BRANDENBURG TELEPHONE COMPANY	)	
	)	
Defendant	)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S**  
**RESPONSE TO BRANDENBURG TELEPHONE COMPANY'S MOTION FOR**  
**PARTIAL SUMMARY JUDGMENT**

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files its Response to Brandenburg Telephone Company's ("Brandenburg") Motion for Partial Summary Judgment filed on May 15, 2007.

There are genuine issues of fact regarding the ACS Traffic Dispute as indicated by Brandenburg in its Motion to Schedule a Public Hearing filed with the Commission on April 2, 2007, therefore, summary judgment is not appropriate. *See Brandenburg Telephone's Motion to Schedule a Public Hearing*, at 1 ("A hearing is appropriate in this matter because ... the parties attended an informal conference before Commission staff on March 15, 2007 wherein the parties identified *genuine issues of fact that are appropriate for resolution through a formal hearing.*")

Among the disputed issues are whether BellSouth made double payments for the ACS Traffic and whether BellSouth sent ACS Traffic over the EAS trunk groups. Brandenburg itself has introduced a genuine issue of material fact by disputing that BellSouth made double payments for the ACS Traffic during the Relevant Period when BellSouth's records produced in evidence show that BellSouth did. Brandenburg disputes another genuine issue of material fact by its statement that it "assumed" that BellSouth was sending ACS Traffic over the EAS trunk groups, when BellSouth has produced evidence that shows BellSouth did not. These genuine issues of material fact being disputed between the Parties are evident in the BellSouth Complaint, in Brandenburg's Answer, during the Informal Conference as pointed out in Brandenburg's letter dated April 2, 2007, in which it requested a hearing, and in Brandenburg's own Motion for Partial Summary Judgment.

The law is clear in Kentucky that where there is a genuine issue of material fact, then summary judgment should not be granted. CR 56.03. Summary judgment is "only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest, Inc. v. Scansteel Service Ctr.*, Ky., 807 S.W.2d 476, 480 (1991). Brandenburg has not made such a showing. As the court further stated in *Steelvest*, the record "must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id.* (citations omitted). BellSouth could prevail on the evidence it has already provided in this case when viewed in a light most favorable to BellSouth. A summary judgment should not be granted

if there is any issue of material fact, as in this case, even though the trier of fact may believe the party opposing the motion may not succeed at trial. *Id.*, citing *Puckett v. Elsner*, Ky., 303 S.W.2d 250 (1957). Under Kentucky law, “summary judgment is to be cautiously applied and should not be used as a substitute for trial.” *Steelvest*, 807 S.W.2d at 483.

There are facts that are not disputed in this case that when reviewed in a light most favorable to BellSouth would warrant a decision for BellSouth. For example, BellSouth does not dispute that it made an error in paying Brandenburg twice for the same ACS Traffic,<sup>1</sup> and in not detecting the error until 2004, approximately six years<sup>2</sup> after the commencement of double-paying Brandenburg for this traffic. Moreover, once discovered, there is no dispute that BellSouth notified Brandenburg of the double payments in May 2004, stopped payments for ACS Traffic under the Settlements Process *without challenge or protest* from Brandenburg, and no longer specifies a payment for ACS Traffic as a separate line item through the Settlements Process. *Answer*, ¶ 5.

There is also no dispute that at all times relevant to the Complaint, ACS Traffic was included as a line item in the Settlements Process statements and that BellSouth paid Brandenburg for this traffic through the Settlements Process

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<sup>1</sup> The term “ACS Traffic” as used in this docket is a generic term that includes Area Plus traffic and should not be confused with BellSouth’s traditional Area Calling Service plans set forth in BellSouth’s Price List.

<sup>2</sup> BellSouth had indicated in its Complaint that Brandenburg began CABS billing in or around 1998. Brandenburg alleges it was in 1995. This difference has no impact on BellSouth’s claims in this case. Assuming Brandenburg is correct, and assuming Brandenburg first received payment for ACS Traffic from BellSouth in December 1997, as it states in its Answer, BellSouth would have still made double payments for the ACS Traffic going back to 1998 as it alleged. Furthermore, this date is not relevant to the outcome of this case since BellSouth is not asking Brandenburg to go back to 1995 or 1998 for those overpayments, but is only asking for reimbursement of its overpayments made in the two-year period prior to BellSouth discovering the error in 2004.

at least since December 1997. See *Complaint*, Exh. 2, and *Brandenburg Answer to Complaint*, ¶ 3. Finally, there is no dispute that BellSouth paid Brandenburg for BellSouth traffic that terminates on Brandenburg's network over BellSouth's access trunks known as the common transport trunk group ("CTTG") through the CABS billing process. *Brandenburg Motion* at 2.

What is disputed is whether BellSouth sent the ACS Traffic over the EAS trunk groups. Brandenburg admits that it was aware of having received the double payments when BellSouth began them by alleging that it notified BellSouth to inquire about the ACS Traffic listed on the Settlements Process statement. *Id.* at 2. When BellSouth did not respond to this inquiry, according to Brandenburg, it was "left to *assume* that BellSouth was terminating the ACS traffic over the EAS (Extended Area Service) trunks, which are not subject to CABS." *Id.* at 3 (emphasis added). Brandenburg's *assumption* was wrong and BellSouth disputes this material fact.

There is simply no evidence to suggest that the ACS Traffic at issue in this case was, during the Relevant Period, or is today, being routed over any trunk group other than the CTTG. BellSouth's research of traffic volume and routing changes for the CTTG trunk groups support there have been no changes to the routing of traffic from the CTTG to any other trunk group, including EAS trunk groups. BellSouth has presented further evidence as indicated below to prove that ACS Traffic is traffic that is routed over the CTTG and as such is included in the minutes of use billed through CABS.

Because there are genuine issues of material fact and BellSouth could prevail on the evidence already presented or to be presented, a summary judgment for Brandenburg is inappropriate and Brandenburg's motion should be denied.

Brandenburg's reliance on *Monsanto Co. v. Reed*, Ky., 950 S.W.2d 811 (1997) in support of its argument that the Commission should enter judgment in Brandenburg's favor "pursuant to the doctrine of spoliation" is misplaced and without merit for several reasons.

*First*, BellSouth did not engage in "spoliation of evidence." Brandenburg, in its Motion, wants the Commission to believe that BellSouth intentionally "destroyed" relevant information in this case, when Brandenburg knows that is not true. The "call detail records" that Brandenburg refers to are switch recordings generated in the BellSouth switch. BellSouth does not keep switch recordings for extended periods of time due to the sheer volume of such records. BellSouth disputes Brandenburg's characterization of the facts surrounding the production of such records. By the time Brandenburg asked for these records, BellSouth no longer had them and informed Brandenburg of that fact at the time Brandenburg first requested them.<sup>3</sup> For Brandenburg to infer or imply otherwise, is incorrect. Brandenburg has not shown that there was any misconduct or intentional destruction of evidence by BellSouth to warrant a claim of spoliation of evidence.

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<sup>3</sup> In fact, if Brandenburg maintained its switch recordings that it uses to bill BellSouth on its CABS bills, it would have the very data it seeks.

Moreover, although BellSouth no longer had the switch recordings requested by Brandenburg, BellSouth researched its usage data on the various types of traffic utilized in the Settlements Process for a six-month period during the Relevant Period to compare the minutes of use for the types of traffic that are billed through CABS (e.g., PCP, non-meet-point-bill CMRS, meet-point-bill CMRS and Bell-to-ICO ACP (ACS Traffic)) with the actual minutes of use billed by Brandenburg to BellSouth through CABS to compare the total usage between the two. BellSouth conducted this research to assure that the numbers were consistent with BellSouth's claim before it continued with its request for reimbursement of the overpayments. BellSouth shared this information with Brandenburg in an email dated April 6, 2005. See *Complaint*, Exh. 3. The research revealed that 17.5% of the traffic terminated for that six-month period was ACS Traffic, and there was *less than one percent differential on average* between the actual minutes billed through CABS and BellSouth's usage data. *Id.* This research confirmed that the ACS Traffic was sent over the CTTG and was, therefore, included in the CABS billing. *Id.*

*Second*, the Supreme Court of Kentucky in *Monsanto* refused to recognize a new cause of action for spoliation of evidence, but held instead that where the "issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions." *Id.* at 815, citing *Tinsley v. Jackson*, Ky., 771 S.W.2d 331 (1989) and *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988). So, even if BellSouth did engage in spoliation of evidence, which it denies, the appropriate remedy would not be a

granting of summary judgment. The holdings in *Monsanto* in no way support a conclusion that a summary judgment would be appropriate in this case.

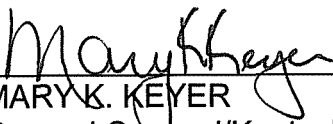
Brandenburg's claim that it is entitled to summary judgment in this case based on the unavailability of what it refers to as "call detail records" is unsustainable. Not only does it attempt to discredit industry standard practices that telephone companies have used for years in the billing and Settlements Process, it also ignores the evidence that BellSouth has provided to show that the ACS Traffic in question is and has always been sent over the CTTG and that BellSouth has paid Brandenburg twice for the same traffic. The standard for granting summary judgment is not whether the Commission believes BellSouth will prevail on its claim, but is whether BellSouth could *not* prevail under any circumstances. *Steelvest, supra*. Such is not the case. BellSouth can and should prevail based on the evidence it has presented in this case. The uncontroverted evidence is that (1) BellSouth has sent ACS Traffic over the CTTG since ACS Traffic came into being, (2) BellSouth has made no changes in the routing of ACS Traffic to any other trunk groups, including EAS trunk groups, which is confirmed by records going back to at least 1999, three years prior to the beginning of the Relevant Period, (3) the ACS Traffic was included in both the CABS billing and the Settlements Process, (4) Brandenburg was compensated for ACS Traffic under the Settlements Process and for traffic terminating over the CTTG through CABS, and (5) Brandenburg never challenged BellSouth when it notified Brandenburg of the double payments in



2004 and stopped compensating Brandenburg for ACS Traffic in the Settlements Process from that point going forward.

Based on the foregoing and Kentucky law, Brandenburg's Motion for Partial Summary Judgment on the ACS Traffic Dispute should be denied.

Respectfully submitted,

  
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MARY K. KEYER  
General Counsel/Kentucky  
601 W. Chestnut Street  
P.O. Box 32410  
Louisville, KY 40232  
(502) 582-8219  
[mary.keyer@bellsouth.com](mailto:mary.keyer@bellsouth.com)


J. Phillip Carver  
Senior Attorney  
Suite 4300, 675 W. Peachtree St., NW  
Atlanta, GA 30375  
(404)335-0710  
[j.carver@bellsouth.com](mailto:j.carver@bellsouth.com)

COUNSEL FOR BELLSOUTH  
TELECOMMUNICATIONS, INC.

**CERTIFICATE OF SERVICE -- KPSC 2006-00546**

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by U.S. mail this 8th day of June, 2007.

John E. Selent  
Holly C. Wallace  
Dinsmore & Shohl, LLP  
1400 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202  
[John.Selent@dinslaw.com](mailto:John.Selent@dinslaw.com)  
[Holly.Wallace@dinslaw.com](mailto:Holly.Wallace@dinslaw.com)

  
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Mary K. Keyer