

Dinsmore & Shohl LLP
ATTORNEYS

Holly C. Wallace
502-540-2309
holly.wallace@dinslaw.com

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MAY 15 2007

PUBLIC SERVICE
COMMISSION

May 14, 2007

Via Federal Express

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

Re: *In the Matter of: BellSouth Telecommunications, Inc. v. Brandenburg Telephone Company, Case No. 2006-00546*

Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of Brandenburg Telephone Company's Motion for Partial 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

cc: All Parties of Record

VERIFIED STATEMENT OF FACTS

On January 1, 1985, Brandenburg Telephone and BellSouth executed an Agreement for the Provision of Telecommunication Services and Facilities ("Agreement"). As part of the Agreement, BellSouth compensated Brandenburg Telephone for terminating traffic through a settlement process, whereby BellSouth was to "net" amounts due to and from Brandenburg Telephone, based on BellSouth's records, and remit payment accordingly.

In January 1995, prior to receiving any ACS traffic from BellSouth, and following months of coordination with BellSouth, Brandenburg Telephone implemented its Carrier Access Billing System ("CABS"). CABS permits Brandenburg Telephone to identify and capture for billing purposes intrastate access traffic that enters Brandenburg Telephone's network over BellSouth's access trunks (a/k/a Common Transport Trunk Group ("CTTG")). Thus, with the implementation of CABS, Brandenburg telephone began billing BellSouth for terminating intrastate access traffic over the CTTG.

In or about December 1997, Brandenburg Telephone first received payment through the settlements process for what BellSouth labeled as ACS traffic. ACS traffic refers to intrastate traffic originated by BellSouth customers who subscribe to BellSouth's Area Calling Service Plan. In exchange for a flat fee, these BellSouth subscribers receive an enlarged local calling service area. To Brandenburg Telephone, however, ACS traffic is indistinguishable from any other intrastate access traffic it receives from BellSouth. Thus, only BellSouth is in a position to determine how much ACS traffic it is terminating to Brandenburg Telephone, and over what facilities.

Upon first receiving payment from BellSouth for ACS traffic through the settlement process, Brandenburg Telephone called Charlotte Lord (formerly Youngblood) at BellSouth to inquire into the nature of the traffic and the purpose of the payment. BellSouth did not respond to the inquiry.

Brandenburg Telephone was left to assume that BellSouth was terminating the ACS traffic over the EAS (Extended Area Service) trunks, which are not subject to CABS. Thus, the only way for BellSouth to compensate Brandenburg Telephone for terminating traffic over the EAS trunks is through the settlement process.

For six years BellSouth continued to generate an "invoice" to itself, based on its own call records, and pay Brandenburg Telephone for terminating ACS traffic through the settlement process. In April 2004, BellSouth claims to have discovered that it was paying ACS traffic terminating charges through both the settlements process and CABS, thereby allegedly paying twice for the same service. BellSouth notified Brandenburg Telephone of the alleged overpayment and discontinued paying ACS traffic charges through the settlements process. In a May 11, 2004 letter to Randall Bradley of Brandenburg Telephone, BellSouth formally requested that Brandenburg Telephone make an adjustment for the alleged overpayments. During a conference call with BellSouth, Brandenburg Telephone requested call detail records ("CDRs") from BellSouth to verify that BellSouth had been paying for the same ACS traffic through both systems. CDRs could easily be compared with CABS records to determine whether the same calls were being billed under both the settlement process and CABS. Only BellSouth possessed the CDR, however.

Although BellSouth would still have had relevant CDR in May 2004 when Brandenburg Telephone requested it, BellSouth failed to either produce the records or take steps to preserve them. Rather, one year later on April 6, 2005, BellSouth sent an e-mail to Randall Bradley containing a "traffic study" alleged to show duplicate payments. The "study," however, was nothing more than a BellSouth-generated summary of minutes of use which, by BellSouth's own admission, varied by as much as 5.5% from Brandenburg Telephone's CABS bills. Moreover, once again,

BellSouth did not provide Brandenburg Telephone with the CDR to substantiate the summary of minutes.

On December 13, 2006, BellSouth filed the present Complaint against Brandenburg Telephone seeking reimbursement for alleged overpayment for ACS traffic from April 2002 to March 2004, plus interest.¹ On March 15, 2007, BellSouth, Brandenburg Telephone, and Commission staff participated in an informal conference. During the conference, Brandenburg Telephone reiterated the need to verify the alleged double-payment through CDR that could only be in the possession of BellSouth, records which BellSouth admits it has destroyed.²

ARGUMENT AND ANALYSIS

I. Standard of Review.

Summary judgment is appropriate in Kentucky "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03.

In *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476 (Ky. 1991), the Kentucky Supreme Court held that "the proper function for summary judgment..." is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Id.* at 482 (citations omitted). Shortly thereafter, the court clarified its ruling in *Steelvest* and noted that "'impossible' is [to be] used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*,

¹ The Agreement does not provide for the accrual of interest of any kind. Moreover, BellSouth's alleged overpayment for ACS traffic, if any, may well be offset by BellSouth's underpayment for ACS traffic to Brandenburg Telephone since May 2004, when BellSouth stopped paying for ACS traffic through the settlement process.

² Brandenburg Telephone questions whether BellSouth knew it was underpaying for ACS traffic and chose not to respond to Brandenburg Telephone's requests for call detail records because production of those records would reveal a pattern of underpayment, or would substantiate that BellSouth should not have discontinued its payments for ACS traffic through the monthly settlement process.

828 S.W.2d 652, 654 (Ky. 1992). Given *Perkins'* pragmatic standard, summary judgment is appropriate in "any case where the record shows that there is no real issue as to any material fact with respect to a particular claim or part thereof or defense thereto." *Continental Casualty Co. v. Belknap Hardware and Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1995) (*Steelvest*, 807 S.W.2d at 482, reaffirmed this standard).

While the movant must meet the initial burden of showing "the absence of a genuine issue of material fact," the movant can meet that burden by "pointing out...that the respondent, having had sufficient time for discovery, has no evidence to support...(its) case." *Steelvest*, 807 S.W.2d at 481. A complete failure of proof on an essential element renders all other facts immaterial and the movant is "entitled to judgment as a matter of law." *Id.* Under this standard, Brandenburg Telephone is entitled to summary judgment on BellSouth's claim as a matter of law.

II. The Commission Should Enter Judgment in Favor of Brandenburg Telephone Pursuant to the Doctrine of Spoliation.

"Spoliation is the destruction or significant alteration of evidence, or the *failure to properly preserve property for another's use as evidence in pending or reasonably foreseeable litigation.*" *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 778 (2nd Cir. 1999); *see also Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997). Destruction of critical documents can lead to "manifest unfairness and injustice" because it increases the "risk of an erroneous decision on the merits" and increased litigation costs related to the development of substitute evidence. *West*, 167 F.3d at 778. "Once spoliation has been established, the sanction chosen must achieve the deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation." *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 287 (E.D. Va. 2001); *see also Monsanto*, 950 S.W.2d at 815 (Kentucky courts address

issues of destroyed or missing evidence “through evidentiary rules and ‘missing evidence’ instructions”).

In the present case, BellSouth failed "to properly preserve [CDR] for [Brandenburg Telephone]'s use as evidence in pending or reasonably foreseeable litigation." *West*, 167 F.3d at 778. The burden of proving overpayments rightfully belongs with BellSouth. Upon realizing it had been making alleged overpayments, BellSouth should have immediately begun preserving, and if necessary recovering, the records in its possession that would prove or disprove that it had double paid Brandenburg Telephone for terminating ACS traffic. Had BellSouth taken appropriate action at the time it discovered the alleged overpayments in April 2004, it would have 60 days of relevant CDRs/switch recordings and 6 months of ICO EMI records.³ Even if BellSouth did not preserve the records until Brandenburg Telephone specifically requested CDR in May 2004, BellSouth would still have approximately one month of relevant CDR. Even in the face of this explicit request for CDR, however, BellSouth still neglected to preserve the records necessary to prove or disprove BellSouth's claim. Thus, spoliation has occurred.

Nonetheless, BellSouth now requests Brandenburg Telephone pay more than \$800,000 based solely on an unsupported summary of minutes of use that BellSouth generated after-the-fact in 2005. BellSouth's failure to preserve relevant CDR in 2004, when litigation was reasonably foreseeable and when Brandenburg Telephone specifically requested the records, significantly increases the "risk of an erroneous decision on the merits" in this matter. *West*, 167 F.3d at 778. Destruction of the

³ In its Answer to Brandenburg Telephone's Data Request No. 10, BellSouth stated that full AMA (Automatic Message Accounting) switch recordings are kept for 60 days and ICO EMI (Electronic Messaging Interface) records are kept for 6 months. BellSouth also stated in its comments to the Intra-Agency Memorandum of the Informal Conference that “BellSouth stated at the informal conference that it normally keeps the CDRs for a rolling 60-day period.” (Mary Keyer’s letter of April 6, 2007 to Ms. Beth O’Donnell, p. 1 (attached as Exhibit A.))

CDR has resulted in Brandenburg Telephone being unable to present evidence in a formal public hearing that could refute BellSouth's claim of double payment. Accordingly, BellSouth's destruction of the CDR has manifestly and irreversibly prejudiced Brandenburg Telephone and its ability to defend against BellSouth's claim.

It is BellSouth's responsibility to provide Brandenburg Telephone and this Commission with reliable proof of the overpayments alleged. Because of the spoliation, BellSouth has not and cannot produce reliable records establishing double-payment. Moreover, Brandenburg Telephone has been prevented from presenting the only direct evidence in defense of BellSouth's claim. Accordingly, the only proper remedy is to grant Brandenburg Telephone's motion for partial summary judgment on BellSouth's ACS traffic claim.


CONCLUSION

BellSouth admits that it destroyed the only direct evidence that would either prove or disprove its claim of double payment for ACS traffic. Nonetheless, knowing that it had destroyed the best evidence of its claim (or lack thereof), BellSouth invoked the power of this Commission in an attempt to force Brandenburg Telephone to pay \$800,000 based on BellSouth's unsubstantiated allegation that it overpaid for ACS traffic from 2002 to 2004. As a matter of law, BellSouth's claim must fail because it can present no direct evidence in support of its claim, *and* it has deprived Brandenburg Telephone of the best evidence against it.

For the foregoing reasons, Brandenburg Telephone Company respectfully requests that the Commission enter summary judgment in its favor on BellSouth's ACS traffic claim, and dismiss that

claim such that Brandenburg Telephone is not obligated to pay anything to BellSouth.

Respectfully submitted,



John E. Selent
Holly C. Wallace
Edward T. Depp
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 W. Jefferson Street
Louisville, Kentucky 40202
(502) 540-2300
(502) 585-2207 (fax)

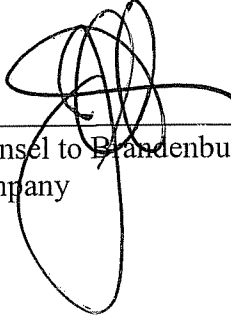
Counsel to Brandenburg Telephone Company

CERTIFICATE OF SERVICE

14~~th~~ I hereby certify a true and accurate copy of the foregoing was served on the following this day of May, 2007:

Mary K. Keyer
General Counsel/Kentucky
601 W. Chestnut Street
P.O. Box 32410
Louisville, KY 40232
Counsel for BellSouth Telecommunications, Inc.

J. Philip Carver, Senior Attorney
Suite 4300
675 West Peach Tree Street, NW
Atlanta, GA 30375
Counsel for BellSouth Telecommunications, Inc.



Counsel to Brandenburg Telephone
Company

120530v1

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

April 6, 2007

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

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

Dear Ms. O'Donnell:

BellSouth wishes to make two comments regarding the Commission's Intra-Agency Memorandum ("Memorandum") dated March 27, 2006, which memorializes the informal conference held in this proceeding on March 15, 2007.

The fifth sentence of the third paragraph of the Memorandum reads, "BellSouth stated that it did not keep CDR [AMA call detail records] for ACS traffics (sic) beyond **11 months** and could not produce the records." (emphasis added) BellSouth stated at the informal conference that it normally keeps the CDRs for a rolling 60-day period.

The second sentence of the fourth paragraph reads, "BellSouth proposed to give Brandenburg Telephone its records for generic ACS traffic and show that BellSouth never changed its definition of ACS traffic and allow Brandenburg Telephone to check this definition against its records." Actually in response to Brandenburg's statement that BellSouth may have routed Area Calling Service (ACS) traffic to Brandenburg via a trunk group other than the CTTG trunk group, BellSouth suggested that Brandenburg provide to BellSouth Brandenburg's recorded AMA records for BellSouth originated traffic over the CTTG trunk group for a certain recent period. BellSouth could then check Brandenburg's records against BellSouth's records for that same period to identify which calls are BellSouth originated Area Calling Service calls that are in fact routed to Brandenburg over the CTTG trunk group. In its April 2, 2007, letter BellSouth requested permission to serve on Brandenburg an additional data request for such records.

Ms. Beth O'Donnell
April 6, 2007
Page 2

BellSouth respectfully requests that the comments made herein be reflected in the Commission's Intra-Agency Memorandum.

The original and four (4) copies of this letter are enclosed for filing.

Sincerely,


Mary K. Keyer

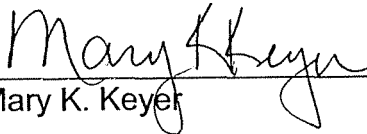
cc: Parties of Record

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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 and email, this 6th day of April, 2007.

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



Mary K. Keyer