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June 27, 2007

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**PUBLIC SERVICE  
COMMISSION**

**Via Hand Delivery**

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:

Enclosed for filing in the above-referenced case, please find the original and ten (10) copies of Brandenburg Telephone's Reply in Support of its Verified Motion for Partial Summary Judgment on the ACS traffic issue. 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

Enclosures

cc: All Parties of Record

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Commonwealth of Kentucky (the "Commission") should prohibit BellSouth from presenting evidence of double payment, and as a result, grant Brandenburg Telephone's motion for summary judgment on the ACS traffic issue.

### **ARGUMENT AND ANALYSIS**

#### **I. Pursuant to the Doctrine of Spoliation, the Commission Should Prohibit BellSouth From Presenting Evidence in Support of its Claim of Double Payment for Terminating ACS Traffic.**

"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 (2<sup>nd</sup> Cir. 1999) (emphasis added); *see also Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997).

It is undisputed that BellSouth failed to preserve call detail records ("CDR") for Brandenburg Telephone's defense of the present matter. In April of 2004, BellSouth claims to have discovered that it was allegedly double-paying for ACS traffic. (Motion for Partial Summary Judgment at 3 (hereinafter "Motion").) At that time, BellSouth should have begun preserving CDR as litigation was reasonably foreseeable. Then, during a conference call between the parties in May of 2004, Brandenburg Telephone requested CDR by which it could verify BellSouth's claim. (*Id.*) BellSouth admits it no longer possessed the CDR in May 2004 when Brandenburg Telephone requested it. (BellSouth response to Brandenburg Telephone's Motion ("BellSouth response"), p. 5) ("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.") This admission, coupled with BellSouth's further admission in its discovery responses that its "standard procedure is to keep full AMA switch recordings for 60 days," demonstrates that BellSouth possessed CDR and destroyed it

at a time when it could reasonably foresee litigating this matter. (BellSouth's answer to Brandenburg Telephone's Data Request No. 10.)

Brandenburg Telephone does not dispute that BellSouth generally does not keep CDR for extended periods of time. Brandenburg Telephone does, however, dispute that BellSouth was entitled to destroy the CDR pertaining to this dispute. When BellSouth identified the alleged double payment in April 2004, and again when the parties had their conference call in May of 2004 to discuss the disputed ACS payments, BellSouth could reasonably foresee litigation with respect to this matter. Notwithstanding this, BellSouth elected to destroy the CDR – the only evidence that Brandenburg Telephone could use to prove its case. Accordingly, BellSouth is responsible for the spoliation of this crucial evidence. *See West*, 167 F.3d at 778 ("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"); *see also Monsanto Co.*, 950 S.W.2d 811 (Ky. 1997).

BellSouth's lone defense to this spoliation rests with its claim that it did not intentionally destroy the CDR. (BellSouth response, p.5.) Spoliation, however, is not defined by the spoliator's intent, but by the result of his actions. *West*, 167 F.3d at 778. If the alleged spoliator fails "to properly preserve property for another's use as evidence in pending or reasonably foreseeable litigation," he has caused spoliation, regardless of whether his actions were the result of negligence or malice. *Id.* BellSouth openly admits it failed to preserve the CDR, despite the reasonable foreseeability of this dispute; therefore, BellSouth committed spoliation.

In the Commonwealth of Kentucky, when the "issue of destroyed or missing evidence has arisen, [the Supreme Court of Kentucky has] . . . chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions." *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

The application of evidentiary rules allows courts to limit, or even prohibit, the admission of evidence to eliminate prejudice resulting from the unavailability of evidence. *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989).

Additionally, courts may impose sanctions under rules of civil procedure or under their inherent power to manage their own affairs. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 3 L.Ed. 259 (1812)) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'")

Accordingly, courts have recognized that dismissal or summary judgment is appropriate when evidence central to the disposition of an issue, claim, or defense on which the outcome of the entire litigation turns is destroyed as a result of will, bad faith, or fault on the part of the destroyer. *See Sipe v. Ford Motor Co.*, 837 F.Supp 660 (M.D. Pa. 1993). *Sipe* illustrates that courts have the power to impose sanctions for spoliation; moreover, the case is analogous to the case at hand.

In *Sipe*, the plaintiff brought a products liability action against Ford Motor Co., alleging that defective wiring in a truck engine block heater caused him to receive an electrical shock when he touched the door handle. *Sipe*, 837 F. Supp at 660. The plaintiff examined the heater, but it was rewired by the plaintiff's employer before the defendant had an opportunity to examine it. *Id.* Even though the plaintiff was not directly at fault for the spoliation of evidence, the court granted the defendant's motion for summary judgment. *Id.* at 661. The court stated that "[t]o allow a plaintiff to go forward with a case in which the defendant's expert would not be able to examine the very product at issue would be unfairly prejudicial . . . [W]e are compelled to dismiss the case for public policy reasons." *Id.*

In the present case, BellSouth seeks to recover over \$800,000 from Brandenburg Telephone for allegedly double paying for terminating ACS traffic. As in the *Sipe* case, however, Brandenburg Telephone has been deprived of the opportunity to examine the very evidence at issue—the call detail records which would reveal whether BellSouth double-paid for the same traffic. Moreover, BellSouth is (by its own admission) responsible for the spoliation. BellSouth alone possessed the records, and BellSouth alone failed to preserve them. (BellSouth response, p. 5.) It would be unfairly prejudicial for BellSouth to proceed with its claim after having destroyed the evidence Brandenburg Telephone needs to defend against that claim. *Sipe*, 837 F. Supp at 661. "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).

As previously noted, Kentucky courts typically attempt to fashion a remedy through "evidentiary rules and 'missing evidence' instructions." *Monsanto*, 950 S.W.2d at 815. Thus, in order to burden BellSouth with the risk of an incorrect determination, and to attempt to place Brandenburg Telephone in the position it would have been in but for BellSouth's spoliation, the Commission should use evidentiary rules to prohibit BellSouth from presenting any evidence of double-payment. Had BellSouth not engaged in spoliation, the parties would have been on equal footing: BellSouth could have presented evidence in support of its claim, and Brandenburg Telephone could have presented evidence in support of its defense. Because BellSouth destroyed the very evidence that Brandenburg Telephone could have used to present its defense, however, the Commission should remedy the matter – through the use of evidentiary rules, rules of civil

procedure, or its inherent power – by prohibiting BellSouth from presenting any evidence regarding its claim. *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989).

Therefore, the Commission should order that BellSouth cannot present evidence of its alleged double payment for ACS traffic.

**II. Absent any Evidence in Support of its Claim, Summary Judgment Against BellSouth is Appropriate.**

"The proper function for a summary judgment in a case of this nature '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." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992) (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W. 2d 255, 256 (Ky. 1985)). 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." *Steelvest v. Scansteel Service Center*, 807 S.W.2d 476, (Ky. 1991).

In the present case, as explained above, the only proper remedy for BellSouth's spoliation of evidence is for the Commission to prohibit BellSouth from presenting evidence of double-payment for ACS traffic. *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989). Because BellSouth will, as a result, be unable to present evidence in support of its ACS traffic claim, it will be impossible for it to present evidence at a hearing warranting judgment in its favor on this claim. *Perkins*, 828 S.W.2d at 654. Accordingly, pursuant to *Perkins v. Hausladen* and *Steelvest v. Scansteel*, Brandenburg Telephone is entitled to summary judgment as a matter of law.

Therefore, the Commission should enter summary judgment in favor of Brandenburg Telephone on BellSouth's ACS traffic claim.

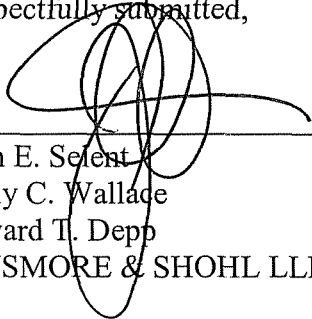
## CONCLUSION

BellSouth possessed CDR that Brandenburg Telephone could have used as evidence to defend against BellSouth's ACS traffic claim. BellSouth then failed to preserve those records after litigation was reasonably foreseeable. Having "tied the hands" of Brandenburg Telephone's defense, BellSouth then invoked the power of this Commission in an attempt to force Brandenburg Telephone to pay over \$800,000 as an alleged refund of unsubstantiated overpayments for ACS traffic from 2002 to 2004.

Without the destroyed CDR, Brandenburg Telephone is severely prejudiced in its ability to defend against BellSouth's ACS traffic claim. The doctrine of spoliation, however, gives the Commission the power to ensure a fair proceeding by prohibiting BellSouth from presenting evidence of any alleged overpayment. *See West*, 167 F.3d at 778 (holding that spoliation remedies are useful to prevent the "manifest unfairness and injustice" that would result if Brandenburg Telephone were forced to defend against the claim without the necessary evidence to do so). Accordingly, the Commission should prohibit BellSouth from presenting evidence of alleged ACS overpayments.

As a consequence of such prohibition, BellSouth will be unable to present evidence at a hearing that would warrant judgment in its favor. Therefore, the Commission should grant Brandenburg Telephone's motion for summary judgment and enter judgment in its favor on BellSouth's ACS traffic claim.

Respectfully submitted,



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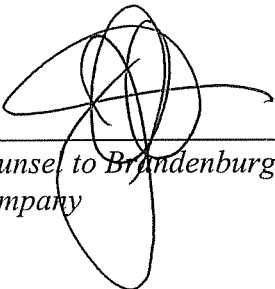
*Counsel to Brandenburg Telephone Company*

**CERTIFICATE OF SERVICE**

I hereby certify a true and accurate copy of the foregoing was served by first-class United States mail on the following this 27th day of June, 2007:

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