

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.)
)
COMPLAINANT)
)
v.) CASE NO. 2006-00546
)
BRANDENBURG TELEPHONE COMPANY)
)
DEFENDANT)

**BRANDENBURG TELEPHONE COMPANY'S REPLY IN SUPPORT OF ITS
VERIFIED MOTION FOR PARTIAL SUMMARY JUDGMENT**

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby files its reply in support of its verified motion for partial summary judgment on the CMRS traffic claim of BellSouth Telecommunications, Inc.'s ("BellSouth").

INTRODUCTION

There is no dispute regarding the parties' actions in this matter. BellSouth and Brandenburg Telephone agree that they are party to a statewide agreement that governed the transit of CMRS provider traffic to rural local exchange carriers including Brandenburg Telephone (the "CMRS Agreement"). The parties agree that pursuant to the CMRS Agreement, Brandenburg Telephone received BellSouth's call detail records ("CDR") (a/k/a EMI records), and that Brandenburg Telephone supplemented those records with its own automatic message accounting ("AMA") records. The parties also agree that Brandenburg Telephone generated bills to BellSouth based on the audited records (BellSouth's EMI records juxtaposed with Brandenburg Telephone's AMA

records). The only remaining questions, and they are questions of law for the Commission to resolve, are: (1) whether Brandenburg Telephone's undisputed actions comply with the CMRS Agreement, and based on the resolution of this first question, (2) whether BellSouth is entitled to recover on its claim, and (3) whether the CMRS Agreement entitles BellSouth to interest.

ARGUMENT AND ANALYSIS

I. BRANDENBURG TELEPHONE COMPLIED WITH THE CMRS AGREEMENT.

Section 2.07 of the CMRS Agreement provides that,

Subject to the audit provisions set forth below in this subsection, the Signatory CMRS Providers and the Rural LECs agree to accept BellSouth's measurement of minutes of use and industry standard call detail records as the basis for the billing from and compensation to the Rural LECs for Covered CMRS Provider Traffic.

(Emphasis added.)¹

Kentucky law is clear that words in a contract are to be given their 'ordinary meaning as persons with the ordinary and usual understanding would construe them.'

Sunny Ridge Enterprises, Inc. v. Fireman's Fund Ins. Co., 132 F.Supp 2d 525, 526 (E.D. KY. 2001) (quoting *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 904 (Ky. Ct. App. 1994)).

It is undisputed that Brandenburg Telephone received and used BellSouth's CDR as the basis for billing BellSouth. (BellSouth's response to Brandenburg Telephone's motion for partial summary judgment ("BellSouth response"), p. 5 ("There is no dispute that Brandenburg, when it received these records . . .") (emphasis added); Brandenburg

¹ The principal definition of accept is, "To receive (something offered), esp. gladly." *The Second College Edition of the American Heritage Dictionary*, Houghton Mifflin Company, 1985.

Telephone's motion for partial summary judgment on the CMRS traffic issue ("Motion"), p. 4.) It is undisputed that the CMRS Agreement provides Brandenburg Telephone with the right to audit BellSouth's CDR. (BellSouth response, p. 5; Motion, p. 4.) It is undisputed that Brandenburg Telephone supplemented the CDR with its AMA records.

Brandenburg . . . admittedly '*supplemented*' the measurement of MOUs [minutes of use] and CDRs supplied by BellSouth with its own automatic message accounting ("AMA") records.

(BellSouth response, p. 5 (*quoting* Motion, p. 2) (emphasis in original.)) It is undisputed that Brandenburg Telephone used the CDR, juxtaposed with its own AMA records, as the basis for billing BellSouth. (BellSouth response, p. 5; Motion, p. 5.)

What is in dispute is whether Brandenburg Telephone's actions comply with the CMRS Agreement. This is a legal question. "Generally, the interpretation of a contract, including whether a contract is ambiguous, is a question of law for the courts" to decide. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 448 (Ky. 2005) (*quoting Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.*, 94 S.W.3d 381, 385 (Ky. Ct. App. 2002.))

Brandenburg Telephone's use of AMA records, in conjunction with BellSouth's CDR, constitutes an audit within the meaning of Section 2.07 of the CMRS Agreement. The Agreement specifically provides Brandenburg Telephone with the right to audit BellSouth's CDR.

Subject to the audit provisions set forth below in this subsection, the Signatory CMRS Providers and the Rural LECs agree to accept BellSouth's measurement of minutes of use and industry standard call detail records as the basis for the billing from and compensation to the Rural LECs for Covered CMRS Provider Traffic.

Notwithstanding the foregoing, any party may request an audit of such measurements within twelve months of the applicable billing date.

(Section 2.07, CMRS Agreement (emphasis added.)) Brandenburg Telephone acted in accordance with the express terms of the CMRS Agreement when it audited BellSouth's CDR by supplementing it with Brandenburg Telephone's AMA.

Therefore, BellSouth is not entitled to recover on its CMRS traffic claim, and the Commission should enter summary judgment in favor of Brandenburg Telephone.

II. WHETHER THE CMRS AGREEMENT PROVIDES FOR INTEREST IS A LEGAL QUESTION FOR THE COMMISSION TO DECIDE.

BellSouth argues that the issue of whether the CMRS Agreement provides BellSouth the right to collect interest, should it prevail, creates a genuine issue of material fact that prevents the Commission from rendering summary judgment. (BellSouth response, p. 2.) BellSouth is mistaken.

As explained above, "the interpretation of a contract . . . is a question of law." *3D Enterprises Contracting Corp*, 174 S.W.3d at 448. It is a long-standing principle that "[i]t is the peculiar province of courts to decide questions of law." *Delany v. Vaughn*, 6 Ky. 379 (Ky. 1814). Therefore, the issue of whether the CMRS Agreement entitles BellSouth to interest, in the unlikely event it should prevail on its claim, is a question of law that may properly be resolved on Brandenburg Telephone's motion for summary judgment.

Moreover, BellSouth is not entitled to interest. Section 2.12 of the CMRS Agreement provides that "any undisputed charges incurred...that are not timely paid by

BellSouth to the Rural LECs, or are not timely paid by a Signatory CMRS Provider to BellSouth, will accrue interest from the date such amounts are due."

Thus, the CMRS Agreement only provides for interest to accrue on amounts allegedly owed *from* BellSouth to Rural LECs (e.g., Brandenburg Telephone), not the reverse. Moreover, interest may only accrue on *undisputed* charges. Brandenburg Telephone disputes that it owes BellSouth any sum above and beyond the \$89,211 (as of the May 8, 2007 billing) it acknowledged owing in its motion for partial summary judgment. Therefore, by the very terms of Section 2.12 of the CMRS Agreement, interest charges cannot be added to BellSouth's claim.

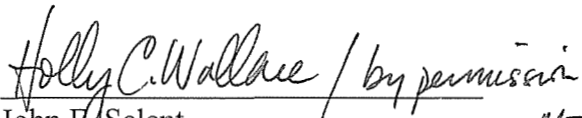
There is no genuine issue of material fact with respect to BellSouth's claim for interest; it is a legal question. Therefore, this matter is appropriate for resolution by summary judgment, and the Commission should grant Brandenburg Telephone's motion.

CONCLUSION

The material facts in this matter are undisputed: (1) Brandenburg Telephone accepted BellSouth's CDR; (2) the CMRS Agreement expressly provides for Brandenburg Telephone to audit the CDR; (3) Brandenburg Telephone juxtaposed the CDR with its own AMA records; (4) Brandenburg Telephone used the audited records to bill BellSouth. The only remaining questions—whether Brandenburg Telephone's actions comply with the CMRS Agreement, whether BellSouth is entitled to recover on its claim, and whether BellSouth is entitled to interest under the CMRS Agreement—are questions of law. Therefore, the Commission may resolve this matter through summary judgment.

Moreover, as explained above, Brandenburg Telephone's actions comply with Section 2.07 of the CMRS Agreement. Therefore, the Commission should grant Brandenburg Telephone's motion for summary judgment on BellSouth's CMRS traffic claim.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following this 29 day of June, 2007:

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